TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 558

ALASKA PACKERS ASSOCIATION, PETITIONER,

vs.

WARREN H. PILLSBURY, AS DEPUTY COMMISSIONER OF THE THIRTEENTH COMPENSATION DISTRICT UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT, AND FRANK WEIDEMANN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 7, 1936.

CERTIORARI GRANTED JANUARY 18, 1937.

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In the Southern Division of the United States District Court, for the Northern District of California.

No. 3101-K

ALASKA PACKERS ASSOCIATION, a corporation,

Complainant,

vs.

WARREN H. PILLSBURY, Deputy Commissioner Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and CAPTAIN FRANK WEIDEMANN,

Defendants.

BILL OF COMPLAINT.

Comes now complainant, and for its bill of complaint against the defendants, alleges:

I.

That the complainant, Alaska Packers Association, is and at all times herein mentioned was a corporation organized and existing under the laws of the State of California, and an employer and self-insurer within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

II.

That Warren H. Pillsbury is and at all times herein mentioned was the Deputy Commissioner of the Thirteenth Compensation District under the

provisions of the Longshoremen's and Harbor Workers' Compensation Act.

III.

That the defendant, Captain Frank Weidemann, was not at [1*] the time of receiving the personal injury hereinafter referred to an employee of the complainant Alaska Packers Association, a corporation, within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

IV.

That on the 15th day of November, 1929, Captain Frank Weidemann was regularly and steadily employed as shipkeeper and watchman of the vessel "Star of Shetland" by one Arthur E. Small, to whom the complainant, Alaska Packers Association, had sold the "Star of Shetland" several months previously; that the said vessel "Star of Shetland" continued to lie at the shipyard of the complainant after the sale thereof to Arthur E. Small, alongside complainant's schooner, "The Metha Nelson"; that on the afternoon of November 15, 1929, the complainant, Alaska Packers Association, having occasion to measure the cubic capacity of the schooner "The Metha Nelson" aforesaid, appointed an employee, one Ernest Califro, to go on board the schooner "The Metha Nelson" to get the necessary dimensions for computing the cubic capacity of the said schooner "The Metha Nelson"; that he was

*Page numbering appearing at the foot of page of original certified Transcript of Record.

further instructed that if any assistance was required to remove the hatches of the schooner "The Metha Nelson", to procure the services and assistance of one John Lyons, or, in the event that said John Lyons was not available for said services, then he, the said Ernest Califro, was to procure the services of one Captain Klotz of the steamer "Kanak" or Captain Frank Weidemann, on board the "Star of Shetland."

V.

That complainant was informed on the evening of November 15, 1929, that the defendant, Captain Frank Weidemann, had fallen [2] from a ladder leading from the deck to the hold of the schooner "The Metha Nelson" and had been injured.

VI.

That thereafter the defendant, Captain Frank Weidemann, made application before the United States Employees' Compensation Commission for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act for compensation and disability payments, and that the said application for compensation was filed with the United States Employees' Compensation Commission for the Thirteenth Compensation District under case No. 238-15, claim No. 237, and entitled "In the Matter of the claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act, Capt. Frank Weidemann, Claimant, against Alaska Packers Association, Self-Insurer, Employer."

VII.

That thereafter and some time prior to February 4, 1930, hearing was had before Warren H. Pillsbury, Deputy Commissioner aforesaid, and inquiry ostensibly made on the part of said defendant, Warren H. Pillsbury, Deputy Commissioner aforesaid, into the facts of the said injury.

VIII.

That thereafter and apparently on the 1st day of February, 1930, the said defendant, Warren H. Pillsbury, Deputy Commissioner aforesaid, issued a compensation order and award of compensation in said proceedings above entitled, by the terms of which the defendant, Warren H. Pillsbury, Deputy Commissioner aforesaid, found as a fact that the defendant, Captain Frank Weidemann, was injured while [3] performing services rendered under an implied contract of hire between defendant, Captain Frank Weidemann, and complainant, Alaska Packers Association, and awarded the defendant, Captain Frank Weidemann, the sum of $264.28 to and including January 7, 1930, less all payments theretofore made on said account, and the further sum of $25 a week thereafter, until the further order of the Deputy Commissioner aforesaid.

IX.

That the complainant herein, Alaska Packers Association, received a copy of said order on Feb-

ruary 4, 1930, and paid the sum of $264.28, in accordance with the order therein contained, and in order to prevent the temporary disability payments of $25. a week from continuing to run, Alaska Packers Association, complainant herein, employed the said Captain Frank Weidemann in the capacity of night watchman at its shipyard at Alameda, California, and has so continued to employ the defendant ever since. That the injuries hereinafter mentioned in no wise interfered with the performance of the duties of night watchman and that the said Captain Frank Weidemann is now and has been, since February 4, 1930, regularly and steadily employed at the rate of $150. a month during all of said time.

X.

That the said compensation order and award of compensation issued February 1, 1930, received by the complainant, Alaska Packers Association, on February 4, 1930, did not in words and terms inform Alaska Packers Association, complainant herein, or put complainant on notice that the said compensation order and award of compensation was not final and conclusive as to all parties therein, and did not inform complainant that there existed any liability in excess of the sum of $264.28 on account of the injury sustained by the said [4] Captain Frank Weidemann on November 15th aforesaid.

XI.

That thereafter and on the 16th day of September, 1931, the defendant, Warren H. Pillsbury, Deputy Commissioner aforesaid, issued a subsequent order fixing compensation for permanent disability rating in the proceedings above mentioned before the United States Compensation Commissioner for the Fifteenth District, by the terms of which the Deputy Commissioner aforesaid found as a fact that the defendant, Captain Frank Weidemann, was permanently partially disabled, and ordered the complainant, Alaska Packers Association, to pay the defendant, Captain Frank Weidemann, for said permanent partial disability $1,025. to and including August 28, 1931, and the further sum of $25. a week thereafter for 60.64 weeks, payable each two weeks.

XII.

That after receipt of the said order fixing compensation for permanent disability aforesaid, the complainant herein, Alaska Packers Association, made inquiry into the cause and nature of the injury sustained by the said Captain Frank Weidemann on November 15, 1929, and discovered that the said Ernest Califro was unable to find the said Captain Frank Weidemann on the afternoon of November 15, 1929, and did not, upon the occasion heretofore mentioned in paragraph IV, request the said Captain Frank Weidemann to render any aid in connection with the taking of measurements of the schooner "The Metha Nelson". That the said

Ernest Califro, being unable to find the said Captain Frank Weidemann on the afternoon of November 15, 1929, procured the services of one A. H. A. Klotz, Captain of the Steamer "Kanak", in connection with the taking of the measurements aforesaid of the schooner "The Metha Nelson", and the complainant [5] further discovered that while the said Ernest Califro and Captain A. H. A. Klotz were down in the hold of the schooner "The Metha Nelson" taking the measurements of the said schooner, the said Captain Frank Weidemann appeared on the deck of "The Metha Nelson and called down the hold to the said Captain A. H. A. Klotz and Ernest Califro, and, unsolicited, started down the ladder leading to the hold of the schooner "The Metha Nelson", and while so doing fell from the ladder to the bottom and thereby incurred the injury alleged and found by the defendant, Warren H. Pillsbury, in the compensation order and award of compensation dated February 1, 1930.

XIII.

That the complainant, Alaska Packers Association, could not, with reasonable diligence, have discovered the aforesaid evidence surrounding the circumstances of the injury to the said defendant, Captain Frank Weidemann, within sufficient time to present the same to the defendant, Warren H. Pillsbury, Deputy Commissioner aforesaid, on or before the issuance of the compensation order and award of compensation dated February 1, 1930.

XIV.

That the order fixing compensation for permanent disability issued September 16, 1931, by the defendant, Warren H. Pillsbury, Deputy Commissioner aforesaid, is in substitution of the earlier compensation order and award of compensation dated February 1, 1930, and that the jurisdiction of the defendant, Warren H. Pillsbury, to make said order fixing compensation for permanent disability dated the 16th day of September, 1931, rests upon the earlier compensation order and award of compensation dated February 1, 1930. [6]

XV.

That the facts submitted to the defendant, Warren H. Pillsbury, upon which the defendant, Warren H. Pillsbury, Deputy Commissioner aforesaid, assumed that he had jurisdiction to make the compensation order and award of compensation dated February 1, 1930, all of which are set out as findings of fact in the compensation order and award of compensation of February 1, 1930, above referred to, were untrue and were known by the said defendant, Captain Frank Weidemann, at the time of the hearing aforesaid to be untrue, and constitute a fraud upon the complainant herein, Alaska Packers Association, and on the defendant, Warren H. Pillsbury, Deputy Commissioner aforesaid.

XVI.

That by reason of the fraudulent misrepresentations of the said Captain Frank Weidemann afore-

said, the said defendant, Warren H. Pillsbury, Deputy Commissioner aforesaid, was, in fact, without jurisdiction to enter the compensation order and award of compensation dated February 1, 1930, and was without jurisdiction to entertain the proceedings above mentioned before the United States Employees' Compensation Commission, or to enter the order fixing compensation for permanent disability dated September 16, 1931, and that the said compensation order and award of compensation and the said order fixing compensation for permanent disability rating are not in accordance with the law and/or the provisions of the Longshoremen's and Harbor Workers' Compensation Act, for the reason that the said Captain Frank Weidemann was not, at the time of said injury, an employee of complainant, nor was the matter of his claim against complainant within the jurisdiction of the said Deputy Commissioner, Warren H. Pillsbury, aforesaid. [7]

XVII.

That thereafter and within thirty days after the issuance of the order fixing compensation for permanent disability of September 16, 1931, above referred to, the complainant, Alaska Packers Association, filed with the defendant, Warren H. Pillsbury, Deputy Commissioner aforesaid, in the proceedings then pending before him, wherein Captain Frank Weidemann was claimant and Alaska Packers Association employer, a petition requesting said

Warren H. Pillsbury, as Deputy Commissioner, for an order setting aside and suspending all previous orders therein issued on the ground that a fraud had been perpetrated against Alaska Packers Association, employer herein, and said Warren H. Pillsbury, Deputy Commissioner aforesaid, and on the further ground that the first compensation order and award of compensation granting the defendant, Captain Frank Weidemann, $264.28, did not in words and terms inform the employer, complainant herein, or put the employer on notice that it was or would be liable to the claimant therein, Captain Frank Weidemann, for any claims or damages in excess of $264.28, and that the employer paid the claimant therein, Captain Frank Weidemann, $264.28 reasonably believing that by such payment the liability of the employer, complainant herein, on account of the injury therein alleged was fully and completely satisfied.

XVII.

That thereafter and on the 16th day of October, 1931, the defendant, Warren H. Pillsbury, Deputy Commissioner aforesaid, issued an order denying the petition for rehearing and further order setting aside previous compensation orders on the ground apparently that the order of February 1, 1930, had long since been final, and that the matters then determined could not be reconsidered, and on the further ground that the showing made in said petition for a [8] rehearing is insufficient; that by the

terms of said order denying the petition for a rehearing the earlier order of September 16, 1931, fixing compensation for permanent disability becomes final and the complainant, Alaska Packers Association, is and will be required by the said Warren H. Pillsbury, Deputy Commissioner aforesaid, to pay to the defendant, Captain Frank Weidemann, the sum of $2,850., or thereabouts, unless the said Warren H. Pillsbury, Deputy Commissioner aforesaid, is restrained by this court from executing said order.

XVIII.

That the said defendant, Captain Frank Weidemann, is insolvent and if an interlocutory injunction is not issued herein restraining the payments required to be paid by the order fixing compensation for permanent disability of September 16, 1931, said payments will be made, and if the complainant herein is successful in its action said payments cannot be recovered from said defendant, Captain Frank Weidemann, and complainant herein will lose the benefits of any favorable decision herein, and by reason thereof will suffer irreparable damage.

XIX.

That the issuance of an interlocutory injunction will not prejudice or otherwise injure the defendant, Captain Frank Weidemann, as the said Captain Frank Weidemann is now and throughout the period of the running of the interlocutory injunction, if issued, will be employed by the complainant,

Alaska Packers Association, in his present capacity as night watchman, at a salary of $150. a month.

Wherefore, complainant prays that a hearing be held by this Honorable Court; that the order denying the petition [9] for rehearing and for setting aside the previous compensation order of October 16, 1931, above referred to, be suspended and set aside and that the order fixing compensation for permanent disability rating dated September 16, 1931, be suspended and set aside, and that the payment of the amounts required by the said award be stayed, and that the defendant, Warren H. Pillsbury, Deputy Commissioner aforesaid, be forever restrained from enforcing the said orders, and for such further or different relief as to the court may seem equitable and just, together with costs of suit.

Dated: November 16, 1931.

PILLSBURY, MADISON & SUTRO
Attorneys for Alaska Packers Association, a corporation, complainant herein.

[Endorsed]: Filed Nov 16 1931. [10]

MOTION TO TRANSFER CAUSE TO ADMIRALTY DOCKET.

To Captain Frank Weidemann, defendant above named, and to Messrs. Resleure, Vivell & Pinckney, his attorneys, and to Warren H. Pillsbury, Deputy Commissioner Thirteenth Compensation District, and to Henry H. McPike, United States Attorney:

You and each of you will please take notice that on the 26th day of December, 1933, at the hour of 10:00 o'clock A. M. on said day, or as soon thereafter as counsel can be heard, at the courtroom of the Honorable Harold Louderback, Room 214, Post Office Building, San Francisco, Alaska Packers Association, complainant above named, will move the above entitled court for its order transferring this cause to the admiralty docket for trial concurrently with suit in equity number 3056-L, entitled as above.

Said motion will be based upon the ground that the above entitled proceeding, number 3101-K, is properly cognizable only in admiralty, upon this notice of motion, upon the papers and pleadings on file in the above entitled action and the action numbered 3056-L, and upon documentary and oral proof to be submitted at the hearing of this motion.

Dated: December 12, 1933.

PILLSBURY, MADISON & SUTRO
Attorneys for Complainant

STIPULATION.

It is hereby stipulated by and between the parties hereto that the above entitled action, numbered 3101-K, is a suit to review findings and compensation award of the Deputy Commissioner Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act for injuries occurring to Captain Frank Weidemann on the navigable waters of the United States, and that the same is on that [11] account cognizable in admiralty rather than in equity, and that the said cause may therefore, with the advice and consent of the above entitled court, be transferred to the admiralty docket, to be tried simultaneously with suit number 3056-L in equity, entitled as above.

Dated: December 12, 1933.

PILLSBURY, MADISON & SUTRO
Attorneys for Complainant

RESLEURE, VIVELL & PINCKNEY,
Attorneys for defendant Captain Frank Weidemann

United States Attorney

[Endorsed]: Filed Dec. 19, 1935. [12]

[Title of Court and Cause.]

STIPULATION THAT AN UNVERIFIED GENERAL DENIAL MAY BE FILED.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that defendant Warren H. Pillsbury, Deputy Commissioner, Thirteenth Compensation District, may file an unverified general denial as his answer to complainant's Bill of Complaint; that it be deemed that in so filing said general denial defendant has not waived his rights to deny specially any and all of said Complaint.

Dated: This ..... day of December, 1933.

H. H. McPIKE
United States Attorney
By S. P. MURMAN
Assistant United States Attorney
Attorneys for defendant Warren H. Pillsbury

PILLSBURY, MADISON & SUTRO
Attorneys for Complainant

[Endorsed]: Filed Dec 26 1933. [13]

[Title of Court and Cause.]

ANSWER TO BILL OF COMPLAINT

Now comes the defendant, WARREN H. PILLSBURY, Deputy Commissioner, Thirteenth Compensation District, by and through H. H. McPIKE, United States Attorney for the above mentioned District of California, and pursuant to Stipulation

heretofore filed herein and in answer to complainant's Bill of Complaint, admits, denies and alleges as follows:

I.

Said defendant denies generally and specifically, each and every, all and singular, the allegations contained in said Bill of Complaint on file herein.

H. H. McPIKE
United States Attorney

[Endorsed]: Filed Dec 26 1933. [14]

[Title of Court and Cause.]

ANSWER TO BILL OF COMPLAINT.

Now come defendants above named and answering to the Bill of Complaint of the complainant above named, admit, deny and allege as follows:

I.

Answering unto Paragraphs I, II, V, VI, VIII, XI and the second paragraph numbered XVII of said complaint, admit the allegations thereof.

II.

Answering unto Paragraph III of said complaint, deny the allegations thereof.

III.

Answering unto Paragraph IV of said complaint, deny that on the 15th day of November, 1929, or

at any other time, Captain Frank Weideman was regularly or steadily employed as shipkeeper or watchman of the vessel "Star of Shetland," or any other vessel, by one, Arthur E. Small; that defendants have no information or [15] belief as to the remaining allegations of said Paragraph IV of said complaint and on that ground, deny each and every of the remaining allegations thereof.

IV.

Answering unto Paragraph VII of said complaint, admit that thereafter and some time prior to February 4th, 1930, hearing was had before Warren H. Pillsbury, Deputy Commissioner aforesaid, and inquiry made on the part of said defendant Warren H. Pillsbury into the facts of said injury, but deny that said inquiry was ostensible or anything but a full, complete and thorough inquiry.

V.

Answering unto Paragraph IX of said complaint, admits that Alaska Packers Association received a copy of said order on February 4, 1930, and paid the sum of $264.28, in accordance with the order therein contained; admit that Alaska Packers Association employed Captain Frank Weidemann in the capacity of night watchman at its shipyard at Alameda, California, and has so continued to employ said defendant ever since, but deny that said employment, or continuance of employment, was for the purpose of preventing the temporary dis-

ability payments of $25.00 per week from continuing to run.

Deny that the injuries hereinafter mentioned, in no wise interferred with the performance of the duties of night watchman, and deny that Captain Frank Weidemann is or at any time has been, since February 4th, 1930, regularly or steadily employed at the rate of $150.00 per month or any sum in excess of $110.00 per month.

VI.

Answering unto Paragraph X of said complaint, deny each and every allegation therein contained. [16]

VII.

Answering unto Paragraph XII of said complaint, defendants have no information or belief as to what inquiries have been made by complainant, nor as to the results of inquiry or investigation made, and on that ground denies each and every allegation in said paragraph contained as to what complainant discovered by said inquiry. Defendants further deny the facts to be that Ernest Califro was unable to find said Captain Frank Weidemann on the said afternoon of November 15th, 1929; deny that said Ernest Califro did not request Captain Frank Weidemann to render aid in the taking of measurements of the schooner "The Metha Nelson."

Admit that Captain Frank Weidemann started down the ladder leading to the hold of the schooner "The Metha Nelson" and while so doing fell from

the ladder to the bottom and thereby incurred the injury alleged and found by the defendant, Warren H. Pillsbury, in the compensation order and award of compensation dated February 1, 1930, but deny that said activity on the part of Captain Frank Weidemann was unsolicited.

VIII.

Answering unto Paragraph XIII of said complaint, deny the allegations thereof.

IX.

Answering unto Paragraph XIV of said complaint, deny the allegations thereof.

X.

Answering unto Paragraph XV of said complaint, deny the allegations thereof.

XI.

Answering unto Paragraph XVI of said complaint, deny that by reason of fraudulent misrepresentations of Captain Frank Weidemann, or otherwise, defendant Warren H. Pillsbury, Deputy Commissioner [17] aforesaid, was without jurisdiction to enter the compensation order and award of compensation dated February 1, 1930; deny that said Warren H. Pillsbury was without jurisdiction to entertain the mentioned proceedings; deny that defendant Warren H. Pillsbury was without jurisdiction to enter the order fixing compensation for permanent disability, dated September 16th, 1931;

deny that said compensation order and award of compensation or the order fixing compensation for permanent disability rating are not in accordance with law and/or in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act, for the reason that said Captain Frank Weidemann was not at the time of said injury an employee of said complainant or otherwise, nor for the reason that the claim of Captain Frank Weidemann against complainant was not within the jurisdiction of said Warren H. Pillsbury, Deputy Commissioner aforesaid, or otherwise.

XII.

Answering unto the first paragraph numbered XVII of said complaint, admit the allegations thereof except that defendants have no information or belief as to what complainant reasonably believed in the premises and on that ground deny that the employer paid the claimant Frank Weidemann $264.28, or any other sum, reasonable or otherwise, believing that by such payment the liability of the employer, complainant herein, on account of the injuries therein alleged was fully, completely or otherwise satisfied.

XIII

Answering unto Paragraph XVIII of said complaint, deny that the defendant, Captain Frank Weidemann, is insolvent.

XIV

Answering unto Paragraph XIX of said complaint, admit the allegations therein, except that Captain Frank Weidemann is now, or throughout the period of the running of the interlocutory in- [18] junction, will be employed at a salary of $150.00 per month or any other sum in excess of $110.00 per month.

WHEREFORE, defendants pray that complainant take nothing by reason of said bill of complaint, that the interlocutory injunction be dismissed and discharged, that the order denying the petition for rehearing and for setting aside the previous compensation order of October 16th, 1931 be approved and confirmed, and that the order fixing compensation for permanent disability rating dated September 16, 1931 be approved and confirmed, and that the amounts required by said award be paid, and that defendant have sueh other and further relief as to the Court may seem equitable and just, together with costs of suit incurred herein.

RESLEURE, VIVELL & PINCKNEY
Attorneys for Defendants.

[Endorsed]: Filed Aug 22 1933. [19]

[Title of Court.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the Fourth day of January, in the year of our Lord one thousand nine hundred and thirty-four.

PRESENT: the Honorable Harold Louderback, District Judge.

(Title of Court and Cause.)

The motion to transfer this cause from Equity to Admiralty, having been heretofore heard and submitted, being now fully considered, it is Ordered that the said motion be and the same is hereby granted. [20]

(TESTIMONY TAKEN IN OPEN COURT)
FRIDAY, JANUARY 5, 1934.

Mr. GILL: If your Honor please, I had a telephone call from Mr. Resleure last night that the stipulation that we transfer the second case to the admiralty docket is agreeable to him.

The COURT: I was awaiting that stipulation from counsel on all sides to see whether we can proceed with both cases this morning. To do so I want a stipulation that the evidence taken in either case you may elect to proceed in may be used as the complete record in the other case. Then I will make the issues as broad as possible in one case and

we will not be proceeding both in admiralty and in equity at the same time.

Mr. RESLEURE: We have not entered into a written stipulation, but your Honor's statement is satisfactory to us.

The COURT: The record will show that you stipulate that the evidence will be taken in the equity case and that the evidence will be available as far as it appertains to the issues in the second case, the admiralty case. That will be the stipulation. Do you agree to that, Mr. Murman, on behalf of the Government?

Mr. MURMAN: Yes.

Mr. GILL: Captain Weidemann, one of the defendants, was the master of the "Star of Shetland," which had been sold by the Alaska Packers Association to a Los Angeles person by the name of Small. He was unable to take delivery of the boat so he left it lying in our yard in Alameda. He employed Captain Wiedemann as master of the boat. Captain Weidemann remained on board the boat prior to a year or more when this accident occurred on November 15, 1929. On the day of the 14th the Alaska Packers had a purchaser for another boat lying in their yard, the "Metha Nelson." The San Francisco office telephoned to the shipyard over there to take the cubic dimensions of the "Metha Nelson." Captain Astrup, the superintendent of the Shipyard, told the draftsman to go down and [21] take the necessary measurements to get the cubic capacity of this boat, and to take a certain

employee of the Alaska Packers with him, which he did. They measured the boat all afternoon. The two boats were lying almost abreast of each other. The captain came aboard the "Metha Nelson" and contributed somewhat to the draftsman's computations, by finding him some documents and telling him more or less about the boat. The next day the draftsman was unable to get the employee who had assisted him the day previous, and upon application to Captain Astrup was told to get Captain Klotz, who was the master of the steamer "Kanak," one of the Alaska Packers' boats, or if he could not get Klotz to get Weidemann, on the "Star of Shetland," to help him finish up taking the measurements on this boat. The draftsman, Califro, was unable to find Weidemann. In the afternoon he was again making measurements with Klotz when Weidemann came aboard the boat without solicitation. He was all the time in the employ of the steamer "Shetland" for the owner Small. He fell from a ladder. We think he fell on account of an idiopathic condition. We are not sure about that. At any rate, he fell into the hold. He was taken to the hospital. Mr. Tichenor, the Vice-President and Superintendent and General Manager of the Alaska Packers, visited him. Weidemann told him he had been injured making these measurements. When the man got well he came over to the Alaska Packers. Mr. Tichenor told him to go down to Mr. Pillsbury and if he was injured in our employment he could present the matter to Mr. Pillsbury. He wrote

out an application for an adjustment claim. The man could not make it out himself on account of injury to his hand. At any rate, Mr. Pillsbury, proceeded to have a hearing. He heard Captain Astrup, Weidemann and Klotz. All of that evidence is made a part of the complaint that has been filed before your Honor. As a result of that Mr. Pillsbury found there was an implied contract of hire, and that Weidemann was our em- [22] ployee, and awarded him on February 1, 1930 $264.28 compensation then due, and $25 a week indefinitely as long as the temporary total disability continued. Very shortly after that award came out the Alaska Packers put him on as a night-watchman, paying him more or less in view of this injury the sum that Small had been paying him. So that there was no temporary disability, and the award became final in thirty days. About fifteen or sixteen months later the original purchaser of the "Metha Nelson" not having bought the boat, we had another purchaser. Inquiries were made as to the accuracy of the computations previously made on the "Metha Nelson" as to the cubic capacity of the boat, and it developed that Weidemann knew nothing at all, and had never participated in the making of those measurements whatsoever. The award had become final. There was no appeal taken. Mr. Tichenor of the Alaska Packers allowed the thing to drag. The man was in our employment and everything. Twenty months after the first award, which became final on March 4, 1930, Mr. Pillsbury, upon receipt of [illegible]

out by our doctor, and after listening to Captain Weidemann's complaint about the condition of his hand, modified his previous order and just multiplied the previous award by ten times or more; in other words, from $264.28, the original award on February 1, which, as I say, became final on March 4, 1930, Mr. Pillsbury, on September 16 issued another modification for permanent disability and awarded Weidemann $2864. When this came out we proceeded before the Deputy Commissioner on a petition for rehearing thirty days before the second judgment became final. Incidentally, there were no proceedings before the Commissioner so far as I know. The transcript shows he asked Captain Weidemann several questions. Within thirty days we petitioned the Commission showing that at the time this had happened Weidemann was the master on the "Star of Shetland", had never been engaged by anybody with authority to employ him on behalf of the Alaska Packers, and whereas [23] the first decree had been done by consent, that our consent to the original award was nullified by the fact that we relied on Weidemann, whom we believed was telling us the truth, and now we found the newly-discovered facts and we asked him to rescind and set aside the entire proceeding on the ground he had no jurisdiction whatever, that the man was the master of a boat and not within the purview of the act, and furthermore that he was never our employee. Mr. Pillsbury denied that and gave as his reason that it was res adjudicata as to all parties,

that the original finding was that the man was our employee, and that that was sufficient. Within thirty days of the second award both of these proceedings were brought, the first being a pure bill in equity to impeach the judgment upon its face; the second proceeding was taken in strict conformity with the Longshoremen's Act, that the second award was without the authority of the Commissioner to make as it had relation back to the reservation clause in this award on February 1, 1930, to which we were entitled to a review upon reopening which he refused, as a consequence of which we are in this Court.

I have prepared a trial brief that may be of some assistance to your Honor.

Mr. RESLEURE: At this time, if the Court please, we would like to make a motion for judgment upon counsel's opening statement. The record discloses, and Mr. Bill has stated, that the first award was made and became final on March 4, 1930. That is the only award for compensation which is subject to review. These later modifying orders are not subject to review, at all. So that there is only one method that is available to counsel to attack that judgment after becoming final, and that is by proof of extrinsic fraud in the case. According to the statement of counsel, if it is all accepted as correct, there is absolutely no showing whatsoever of [24] extrinsic fraud, which means, of course, that there must be some act on the part of Weidemann concealing evidence, or some active provocation on the part of Weidemann, or the Commissioner, to ex-

clude the possibility of obtaining evidence to contradict what went on in the first proceeding on the part of Captain Weidemann.

Mr. MURMAN: The district attorney, your Honor, concurs in that motion.

Mr. RESLEURE: We might also point out that we believe that neither of these bills can stand under the provisions of Section 21-B of the Longshoremen's Act, which provides but one method of appeal, and that a method to be taken within thirty days of the order. So there is no review here at all, even by injunction in equity. But if such a remedy were available to the complainant here it would have to be on proof of extrinsic fraud, and there is absolutely no showing of that.

Mr. GILL: On page 3 of my memorandum appears a decision by your Honor in January of 1932, after both of these cases were brought, in United Fruit Company v. Pillsbury, which holds, in effect, that on the face of the record as disclosed by the award it was absolutely without warrant. I don't know whether your Honor cars to recede from the position taken there, or not. In the event you do feel that this second judgment was within the Deputy Commissioner's authority there is a case in the Fifth Circuit holding that by second orders where the Deputy Commissioner undertakes to modify a prior order which has become final that he should look into the evidence and consider the evidence given at the first hearing terminating in a

previous final judgment. The motion is not well taken.

Mr. MURMAN: Mr. Gill has referred to your decision rendered recently in the case of United Fruit Company v. Pillsbury. I have looked at that case very carefully. Your Honor will recall that in that case there was no showing and no contention made regarding extrinsic fraud. That case involved the [25] reserving of jurisdiction after the proceedings before the Commissioner had been terminated. Your Honor correctly decided in that case that the Commissioner could not reserve jurisdiction after he had terminated proceedings. This case is altogether different. In this case plaintiff is attempting to establish grounds for collateral attack upon an order made by Mr. Pillsbury a year and a half previous to the filing of the complaint. Obviously, under the statute, the Longshoremen's Statute, such a proceeding would be in the very teeth of the statute. So plaintiff relies upon an equity proceeding attacking the judgment on the ground of fraud. The statement made to your Honor did not fully state the necessary elements of extrinsic fraud. Extrinsic fraud has to do not with the false testimony rendered at a proceeding, but the withholding of testimony for the benefit of a party in a proceeding to the party's detriment and to the subsequent judgment against that party. In this case it is the contention, apparently, of plaintiff that Captain Wiedemann did not tell the truth before the Commissioner. If he did not tell the truth [illegible]

that the plaintiff had was to proceed according to statute, which provides a definite system of review; in other words, bringing injunction proceedings in the District Court within thirty days after the award. That was not done in this case. Now, with merely the statement that Captain Wiedemann did not tell the truth, and that there was newly-discovered evidence subsequently uncovered, the plaintiff attempts to come into Court on the ground of fraud.

I refer your Honor to a case decided in 1926 by the Court of Appeals of the District of Columbia, entitled, "Fidelity Storage Company v. Urice," 12 Fed. (2d) 143. In that case the proceedings were exactly similar. There had been a judgment in the Municipal Court in the District of Columbia. Subsequently, the party that was unsuccessful in [26] those proceedings brought injunction proceedings to have the judgment of the Municipal Court set aside on the ground of fraud. The Circuit Court, on reviewing the proceedings before the District Court that had denied the injunction, said:

> "We have not overlooked the doctrine that courts of equity possess authority to set aside and annul judgments at law rendered between the same parties by courts of competent jurisdiction for fraud, but the fraud in such case must be extrinsic or collateral. For example: Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false

promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed sells out his *claient's* interest to the other side. False and perjured testimony introduced by the prevailing party relative to the issue on trial does not afford ground for such relief in equity, for in any case, to justify setting aside a decree for fraud, whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense."

Chief Justice Taft, in Toledo Scale Co. v. Computing Scale Co., 261 U. S. 421 is cited for that statement.

"Mere false testimony, or forged documents, are not enough if the disputed matter has been actually presented to and considered by the tribunal."

In other words, where there is a definite procedure for appeal the party that is unsuccessful must follow that procedure in order to attack a judgment rendered; or if that procedure is not available, or if the party does not follow that procedure the only other remedy is to go into equity on the ground of [27] extrinsic fraud, because to allow [illegible] ground in equity would provide an [illegible]

judgments rendered in the District Court, or in the trial court.

Mr. GILL: Mr. Murman has overlooked one thing in my opening statement, and it is this: I said, and if I did not say so I ask permission now to say it, that the original decree entered by Mr. Pillsbury was a consent decree. Our consent to that decree had been procured by fraud. That is an entirely different thing from trying to upset a judgment on false testimony. As a matter of fact, the testimony before the Deputy Commissioner is made a part of the complaint, and it is a part of the statement in this case. We do not rely on that, at all. Our position is that this was a consent judgment for $264.28, which we paid. Afterwards we discovered that our consent to that decree had been procured by fraud of the man who benefited by the judgment. That subsequently to that Mr. Pillsbury, without allowing us to show that fact, modified the award 20 months later, and awarded $2864; in other words, just 100 per cent. more.

The COURT: What is the gist of the fraud? What was done that you believe constituted fraud?

Mr. GILL: That Mr. Pillsbury took jurisdiction of this matter and made a consent judgment.

The COURT: What was the fraud of the plaintiff?

Mr. GILL: That Wiedemann told us he had been injured in the course of his employment. He did not tell that to Mr. Pillsbury. He told us. We sent him over to Mr. Pillsbury. The informality of

these proceedings is well known to the Court, I take it. When a man is injured aboard a ship they send him to Mr. Pillsbury and ask him to assess how much is due.

The COURT: What are the statements that were made?

Mr. GILL: He told us that he had been employed by Astrup. We offer to prove by Mr. Pillsbury, himself, by letters, etc., made a part of his file and mentioned in Mr. Pillsbury's own [28] record, substantially the theory that this was a consent judgment, that nobody appeared there on behalf of the Alaska Packers. Astrup had actually told Califro to go down and find Klotz. Klotz was away up in Alaska when inquiry was made. We interrogated Astrup and he said, "Yes, I told Califro to get one or the other of them," the Complaint is not limited to fraud. It is on the theory that the Deputy Commission had no jurisdiction to make this judgment. Weidemann was master of the ship.

The COURT: Your point is he was not employed?

Mr. GILL: That he was not employed.

The COURT: In other words, you didn't know that?

Mr. GILL: We told Mr. Pillsbury we consented to a judgment for $264.28 if that is what you feel this man is entitled to, and he said, "Yes, that is right." That was the extent of our consent.

Mr. RESLEURE: Your complaint is that you think Mr. Pillsbury did not advise you that he might make an additional award later?

Mr. GILL: He made a reservation, no doubt, but the authorities hold that that reservation does not entitle him to make a different award subsequently.

Mr. MURMAN: The opinion rendered by your Honor was on a different state of facts. In United Fruit Company v. Pillsbury the Commissioner had terminated all proceedings, he had decided that there was nothing more to be done in that particular case. Subsequently he decided there should be another award made. In this case the proceedings had never been terminated.

The COURT: In the case I decided there was a final award with the right to reopen.

Mr. MURMAN: The exhibit made part of the complainant's pleadings here sets forth the award made by Mr. Pillsbury in February, 1930. That award is that the employer, Alaska [29] Packers Association, shall pay to claimant compensation as follows: The sum of $264.28 to and including January 27, 1930, less all payments theretofore made on said account, and the further sum of $25 a week thereafter until further order. On its face that is no termination of the proceedings. It is an express statement that there shall be a further order, and that $25 shall continue to be paid until such further order. Counsel has made several statements to your Honor. One of them was that the

complainant consented to this decree. On the contrary, there was no consent to the actual award. There was merely a consent that plaintiff should not be represented before the Commissioner. Part of complainant's pleadings in Exhibit C is the record before the Commissioner. That record shows as follows:

> "Mr. PILLSBURY: I telephoned Mr. Tichenor this morning to ascertain if he wished to be represented at this morning's hearing. His reply was that he did not think it necessary to be represented and wished to submit the matter for decision upon the statements of witnesses to be taken this morning in his absence."

The COURT: Let me ask you this: If Captain Weidemann actually knew he was not employed by the Alaska Packers Association but he went to them with the idea in mind of preventing them from making a showing or making a full investigation, realizing that the man who had actually employed him was not available at the time, but acting under that idea of fraud and deception persuaded them to actually remain away or accept the award which might be made, do you not consider that the type of fraud that counsel states? I think we had better proceed with the trial.

Mr. RESLEURE: Before your Honor rules on that, the statement here is not that they induced them to remain away, the record shows that Cap-

tain Astrup, the representative and superintendent of the Alaska Packers was actually present at [30] the hearing and gave testimony.

Mr. MURMAN: And that is part of the complaint's pleading.

Mr. GILL: I think the complete answer to all of this is——

The COURT: Just a moment. Who was the man who was supposed to have hired for your people?

Mr. GILL: Astrup.

The COURT: And Astrup actually appeared?

Mr. GILL: Astrup appeared.

The COURT: I thought you said he was not available.

Mr. GILL: Klotz was also at the hearing before the Deputy Commissioner. He appeared as Weidemann's witness.

Mr. MURMAN: And that testimony is made part of the complainant's complaint.

Mr. GILL: Yes, it is. The man that Astrup testified before the Deputy Commissioner was the person to whom he said, "If you can't get Knotz get Weidemann" was Califro.

The COURT: Apparently there is a confusion in the names. Who was the man who was supposed to have actually arranged for the employment of Weidemann?

Mr. GILL: Califro is the man. He was the [illegible]an.

The COURT: In other words, your contention is that Califro was authorized by one of your officials to employ Weidemann?

Mr. GILL: Yes, your Honor.

The COURT: He did not appear at the hearing?

Mr. GILL: No.

The COURT: And the fraud you are contending for is that not having seen Califro and being told by Weidemann that Califro did employ him, and you knowing that Califro was authorized to do it, and not knowing that he had not done so, you believe Weidemann made fraudulent representations to prevent you from making an investigation into the matter.

Mr. GILL: Yes, that is it exactly.

The COURT: Weidemann did not keep Califro away. Califro did not testify, did he? [31]

Mr. RESLEURE: No.

The COURT: Then the issue goes as to whether he employed him, and if he did not employ him whether Weidemann knew that and continued to deceive the company for the purpose of getting an award.

Mr. RESLEURE: We are satisfied with that statement of the issues, your Honor.

The COURT: Then let us proceed. I will overrule the motion.

ERNEST CALIFRO,

called for the plaintiff; sworn.

Mr. GILL: Q. Mr. Califro, you were employed by the Alaska Packers in November of 1929?

A. I was.

Q. In what capacity?

A. As a draftsman.

Q. When did you enter the employment, do you remember when you went to work for the Alaska Packers Association?

A. The date?

Q. Yes, when did you go to work for them.

A. It was about two weeks prior to the time of this particular accident.

Q. Two weeks prior to November 15?

A. Yes.

Q. How long after November 15 did you work for them?

A. About one week after that.

Q. Do you remember being asked by Captain Astrup, the superintendent of the Alaska Packers Shipyard on November 13 or 14 to take the measurement of the hold of the "Metha Nelson" for the purpose of computing its cubic capacity?

A. Yes, I was told by Mr. Astrup, the superintendent of the plant, to compute the cubic capacity of this particular hold of the "Metha Nelson."

Q. Just go ahead and tell the Court what you [illegible]rd to that.

A. [illegible] on board the "Metha Nelson" the fir[illegible] removed certain objects in order to

(Testimony of Ernest Califro.)

get down into the hold of the ship. While we were aboard the vessel the first day Captain Weidemann appeared on deck and he asked me [32] if I was the prospective buyer of the ship. Being a new employee of the corporation he did not know me, and I did not know him; we were unbeknown to each other. He told me he was the master on board the "Star of Shetland." We had a general conversation. He said he had been an officer of some kind on board the "Metha Nelson" a few years back and he had made a voyage off the coast of South America. Our general conversation was about the South American Coast. I had just returned from a trip down in that section of the country. I asked him if he had any specific data in regard to the lines of the ship, or any draft measurement. He said, "I will see." So he proceeded into the cabin of the vessel and found some old documents that were in some cabinets there. There were some measurements and dates when the ship was built, and general dimensions, etc. So I proceeded, myself, and took most of the dimensions along with another man that I had taken with me, John Lyons. He was an employee at the Packers plant, in the storeroom.

Q. John Lyons was the storekeeper?

A. Yes.

Q. And on the morning of November 14, as I understand you, Captain Astrup instructed you to get Lyons to help you take these measurements?

(Testimony of Ernest Califro.)

A. Yes, I was told by Mr. Astrup to get John Lyons to assist me in taking these dimensions. That was the morning of the 14th.

The COURT: Q. Did he say anything about Weidemann then?

A. No, nothing was mentioned about Weidemann on the morning of the 14th. In fact, I didn't know him, at all.

Mr. GILL: Q. You didn't finish taking the dimensions on the 14th?

A. No. I had taken just the general measurements, the general draft of the ship. I was told the next day that they were not quite complete, and I had to get more dimensions, the cubic contents of the hold, which required a little more measuring. I was instructed to get John Lyons again, as I [33] had done the day before. So I went over to get the assistance of John Lyons. He was very busy in the store-room. So I went aboard the vessel, myself, and tried to get most of the dimensions as far as I possibly could. I got up to a certain point and I could not take any more, I needed assistance. So I came back to the plant and I asked Mr. Astrup if could get someone else to assist me. He says, "Yes, either get Captain Weidemann or get Captain Klotz, if you can't find Captain Weidemann get Captain Klotz." So I went aboard the "Star of Shetland" in search of Captain Weidemann, [illegible] could not find him. I hunted from end of the [illegible] other but he was not to be found. So I [illegible] asked Captain Klotz. He was busy [illegible] "Kanak." I asked him if he could

relieve himself for a few minutes to assist me in taking these dimensions. He said he certainly would. So I went over to the office to get a scratch (Testimony of Ernest Califro.)
pad. I said, "I will be right back." So he and I proceeded down the dolphin line and went aboard the "Nelson."

Q. Let me ask you whether or not this picture clearly represents the dolphin line and the Alaska Packers Shipyard in Alameda—I mean excluding all of these boats which had been sold, or most of them had. In this place representing the office where you were employed?

A. Yes, the office is at this part of the plant.

Q. This is the dolphin line you are speaking about?

A. Yes.

Q. What is the second dolphin line?

The second dolphin line is over here.

Q. Where was the "Star of Shetland?"

A. Lying right here.

Q. It is still there, in the same place now?

A. Yes, it is in the same position.

The COURT: Q. How many feet from there over to here?

A. I would say about 1000 feet.

Mr. GILL: Q. How many people are occupied there or are kept there?

A. Whoever happens to be on board, who has been sent [34] on board to do some particular work; there is no crew aboard the ships.

Q. This was the "Star of Shetland"?

A. Yes.

(Testimony of Ernest Califro.)

Mr. GILL: Q. I will ask you whether or not it was not the "Star of Lapland" that lie immediately behind the "Shetland"?

The COURT: Do you want this made an exhibit?

Mr. GILL: No, I don't think so.

Mr. MURMAN: The witness is testifying by saying, "This here," and "here," and "there." It is very uncertain. I think it should be in evidence.

The COURT: I don't know that these matters are so vitally necessary, anyway. If he states the distances it would be sufficient.

Mr. GILL: Q. Will you tell the Court the position of the "Shetland" and the "Nelson" in regard to the second dolphin line on the day of November 15, 1929?

A. The "Metha Nelson" was on the opposite side of the dolphin line from the "Star of Shetland." The "Star of Shetland" was facing toward land; the bow of the ship was facing toward land. The "Metha Nelson" was about 600 feet astern of the "Star of Shetland," on the opposite side of the dol*fin* line, facing the same direction.

Mr. MURMAN: If your Honor please, I object to these questions and I move to strike the various answers relative to the position of the boats on the ground that it is immaterial, irrelevant, and incompetent. It seems to me it is not important in this case where the boats were lying or the position they occupied in the yard. The important thing

(Testimony of Ernest Califro.)

in this case is whether or not Captain Weidemann was employed. Where the boats were located has no relevancy to his employment. If Mr. Califro was authorized to employ him by Mr. Astrup the only question is whether or not Mr. Califro carried out Mr. Astrup's instruction.

The COURT: I agree with you. In other words, I think this is [35] not essential at the present time. In so far as the questions went where the picture was displayed I will say candidly I did not follow it because the picture was not in evidence, and it was held so I could not see it. That is why I asked if it was to be placed in evidence or was necessary to be in evidence. I don't think we need it. Of course, there is no objection to that coming out on cross-examination. If Captain Weidemann does not appear in the employment here I do not think there is any reason showing where his vessel lay. Possibly on cross examination it might be important. We now merely want to know what business negotiations he had. Apparently he was authorized to employ him. The question now is did he employ him and just what happened.

Mr. GILL: Q. Will you go ahead and tell the Court what you did in the morning and in the afternoon?

The COURT. Q. On the first day you had not employed him?

A. No.

(Testimony of Ernest Califro.)

Q. Now, as to the second day, you say you saw Captain Klotz and you spoke to him?

A. Yes.

Q. In other words, you employed him at that time?

A. I employed Captain Klotz.

Q. It is your opinion you were employing him when you spoke to him on that occasion?

A. Absolutely.

Q. Now proceed.

A. That morning I did not quite finish the dimensions of the vessel, so we went out to lunch; we worked up until noon time; we went out to lunch. After lunch I came back alone. I was aboard making some more dimensions up to a certain point where I needed assistance again. Again I went in search of Captain Weidemann aboard the "Shetland", which was right on the dolphin line right next there, but I could not find him again.

Q. How did you come to seek him again if Captain Klotz was available and you had him in the morning?

A. He was working aboard the "Kanak." I didn't want to disturb him and take [36] him from the work he was doing on the "Kanak." On account of being a little further distant from the "Nelson" I did not want to waste the time going after him.

Q. You talked that over at lunch time, did you?

A. No. We separated then. I went home to lunch. I went on board. Finally I had to have

(Testimony of Ernest Califro.)

assistance and I went after Captain Klotz and he went aboard the "Nelson" again and we proceeded with the dimensions as originally.

Q. That was the afternoon of the second day?

A. Yes.

Mr. GILL: Q. What happened in the afternoon of the second day with regard to Weidemann, did he come aboard the boat and did anything happen?

A. I was down in the hold of the ship when I heard the voice of Weidemann above the deck; I didn't see him on account of the position that I was located in, at the stern end of the hold. He asked me if he could be of any assistance, and I said, "No, we are just about through."

The COURT: Q. At the time that you told him that was anybody else present?

A. Captain Klotz.

Q. You and Captain Klotz and Captain Weidemann?

A. Captain Klotz and I were down in the hold of the ship. I had my back toward the hatch, the opening where the ladder was.

Q. He called down through the hatch?

A. He called down through the hatch. I had my back facing the hatch. Just about that time I heard a commotion over the ladder and I turned around and I saw Captain Weidemann in the air falling toward the bottom.

Q. Prior to the happening of this accident had you sent for Captain Weidemann by anybody?

(Testimony of Ernest Califro.)

A. No, I had not.

Q. In other words, all you did was to go over and make inquiry for him?

A. I asked Captain Klotz if he had seen Weidemann. I told him I would like to get Weidemann to give me a hand on the "Metha Nelson." He said, "That's all right, I'll give you a hand, I will gladly do it."

Q. This falling down into the interior of the ship, that occurred before you ever made any arrangements at all with Weide- [37] mann?

A. In fact, I did not see him at all until the time he fell in the ship. That is the only time I saw him from the previous day when he came aboard and I didn't know who he was.

Mr. GILL: Q. I want you to be perfectly clear if you can about the instructions Astrup gave you in regard to the employment of either of these men. Do you remember exactly what it was he told you on the morning of the 15th when you could not get John Lyons to help you?

A. On the morning of the 15th he asked me to go ahead and get Johnny Lyons to assist me.

The COURT: Q. To again assist you?

A. To again assist me as he had done the previous day. I proceeded over to the warehouse where John Lyons was working and he said he was very busy and he could not relieve himself and could I get someone else. That was when I asked Captain Astrup.

(Testimony of Ernest Califro.)

Q. You went back to Captain Astrup?

A. Yes.

Q. And you told him that Lyons was not available?

A. That Lyons was not available and I had to have somebody else to assist me.

Q. What did he say?

A. He said to either get Captain Weidemann or if you can't get Captain Weidemann get Captain Klotz. Those were the exact words.

Mr. RESLEURE: Your Honor, may we have the date of that conversation read by the reporter?

The COURT: Q. What was the date of that conversation?

A. The 15th.

Q. That was the second day?

A. The second day.

Q. What was the month and year?

A. November.

Q. November 15, what year?

A. 1929.

Mr. GILL: That is all.

Cross Examination

Mr. RESLEURE: Q. You say that this accident took place on November 15, 1929?

A. Yes.

Q. Are you sure of that date?

A. Yes, I am positive of it. [38]

Q. Where did you get it from?

A. Where did I get it from?

(Testimony of Ernest Califro.)

Q. Yes, I mean how did you refresh your recollection recently in order to testify it was the 15th?

A. I recollect it in this way: I had left the employ of the Alaska Packers about a week after that particuar accident took place and went to work for a consulting engineer here in San Francisco, and I recall the day I went to work for Leland Rosener. Those dates remain clear in my mind because I had just returned from South America and I know the date I had sailed and I know the date of my employment by the Alaska Packers.

Q. What is the date you returned from San Francisco?

A. I don't recall the exact date on that.

Q. How do you fix the 15th by recalling the date that you came back from South America?

A. At the time I was employed with the Alaska Packers the accident was clear in my mind.

Q. And you have not had to refresh your recollection recently as that date being the 15th?

A. No.

Q. Since November 15, or since November 13, 1929, where have you been?

A. I have been employed by Leland Rosener, and also by the Pacific Gas & Electric Company.

Q. How long were you in the employ of Leland Rosener?

A. About a year.

Q. That would be from around November, 1929 to November, 1930, is that right?

A. Yes.

(Testimony of Ernest Califro.)

Q. Where were you employed by him.

A. 233 Sansome street.

Q. So you were in San Francisco that entire year, were you?

A. Yes, I was.

Q. Did anyone from the Alaska Packers—did you ever return to the Alaska Packers or see anyone in connection with the Alaska Packers Company during that year?

A. No. The only time that anything was mentioned in regard to the Alaska Packers, I was called up one day to go over to Tichenor's—it was not that, it was when Mr. Astrup called me up and [39] asked me if I recalled the particular accident that took place over on the "Metha Nelson." I think that was later, it was not that year.

Q. It was sometime that year?

A. No, it was later on.

Q. At what time was it that Mr. Astrup called you?

A. I believe it was the time—it must have been two years later, at least two years later.

Q. And was that the first time you had heard anything about this accident?

A. That was the first time I had heard anything about it, at all.

Q. Wasn't it in the fall of 1931 that you were called to see Mr. Astrup?

A. It was two years later, yes.

(Testimony of Ernest Califro.)

Q. Were you asked shortly after the accident to give a statement of what had occurred, as far as you knew?

A. I was.

Q. To whom did you give that statement?

A. I gave it to Mr. Astrup.

Q. Have you got that statement still?

A. I have not got it.

Q. You gave it to Mr. Astrup?

A. I did.

Q. You didn't keep a copy?

A. No.

Q. When was that statement given? About how long after the accident?

A. Possibly two years.

Q. You are referring to some conversation?

A. At the time that Mr. Astrup called me up and asked me if I recalled the particular accident.

Q. Immediately after the accident were you asked to give your version of it by anybody?

A. No one asked me at all, no one had approached me in regard to the accident at all.

Q. Did you talk to Captain Klotz or to Mr. Astrup at all about it?

A. I had seen no one.

Q. So that the entire balance of the time you were with the Alaska Packers after this accident —that was about a week or so, was it?

A. Yes.

(Testimony of Ernest Califro.)

Q. (Continuing) —the accident was not mentioned?

A. It was not mentioned. The only time it was mentioned, I asked [40] one of the bookkeepers down in the office how Captain Weidemann was getting along, and they said he was getting along pretty good, he is still in the hospital. That was the only mention of the case at the time.

Q. Has Weidemann ever talked to you about it?

A. No, because I didn't see him at all after he fell in the ship.

Q. Did anyone keep you away from the Alaska Packers' office, or from seeing any of the men there?

A. Nobody that I know of.

Q. Weidemann never said anything that would induce you to keep away, did he?

A. In fact, I didn't see him.

Q. You didn't see Weidemann at all?

A. No.

Q. Mr. Pillsbury, the Commissioner under the Longshoremen's Act, did not keep you away, at all?

A. No one kept me away.

Q. Nobody ever asked you to go to those proceedings?

A. Nothing was ever mentioned, and I didn't hear anything about it, at all.

Q. The Alaska Packers never asked you for your version, at all?

A. Only two years later.

(Testimony of Ernest Califro.)

Q. What time in the afternoon was this accident?

A. About three o'clock, I would say.

Q. Three o'clock in the afternoon?

A. Yes.

Q. It was not just before quitting time?

A. No, it was in the afternoon.

Q. Do you know how Captain Weidemann happened to go onto the ship?

A. That I don't know.

Q. You have no knowledge about that, at all?

A. I have no knowledge about it, whatever.

Q. Captain Klotz might have asked him to come down there, so far as you know?

A. I don't know.

Q. Captain Astrup never asked him?

A. I don't know.

Q. Did you ever ask Captain Klotz to ask Weidemann to come down?

A. I did not. The only conversation that took place [41] between Captain Klotz and myself was the fact that I told him I was in search of Captain Weidemann, and I could not find him. That was the only mention of Captain Weidemann to Captain Klotz.

Q. You don't know whether Captain Klotz took it in his own hands and asked Mr. Weidemann following your statement to him that you were searching for him to come down to the ship, do you?

A. That I don't know.

(Testimony of Ernest Califro.)

Q. When Klotz came down to the ship were you already there on the afternoon of the accident?

A. We were down in the hold together. We were already working.

Q. Are you sure about that?

A. I am positive about that.

Q. If you knew that Captain Klotz says that when he arrived on the ship that afternoon with Captain Weidemann you were not there, would you contradict him?

A. I didn't quite get your question.

Q. If Captain Klotz should testify under oath that when he arrived on the ship that afternoon, just before the accident, that you were not there at all, would you contradict him?

A. I certainly was there, I was aboard the ship.

Q. You would contradict Captain Klotz, then, would you?

A. I certainly know I was there, because I was there when the accident happened.

Q. How long before the accident had you arrived there, would you say?

A. I would say about half an hour.

Q. And how long before Captain Klotz arrived there?

A. We were in the hold of the ship working together.

Q. Half an hour after you arrived there with Captain Klotz Captain Weidemann came to the hatch and called out to you?

A. Yes.

(Testimony of Ernest Califro.)

Q. Do you remember his exact words?

A. He says, "Can I help you any further down there?" And I said, "No, I am just about through, and I don't think it would be necessary."

Q. You had the entire job finished by that time?

A. Just [42] about finished, because I had not taken any more dimensions after that.

Q. What did you answer back to Captain Weidemann?

A. I had my back facing the hatch, and I said, "We are just about through." There were not any more dimensions necessary to take.

Q. Did you use those words, there were not any more dimensions to take, or did you say "We are just about through"?

A. Words to that effect; whether they were the exact words I don't recall.

The COURT: Q. In other words, that is the substance of what you said?

A. The substance of what I said, yes.

Mr. RESLEURE: Q. Did you tell him not to come down in the hold?

A. I said it was not necessary. I did not tell him not to come down in the hold. I said it was not necessary, I was just about finished.

Q. When we first asked you had you seen anyone from the Alaska Packers you said you had a call to go to Tichenor's, and then you stopped; what were you going to say then?

A. That was later.

(Testimony of Ernest Califro.)

Q. How much later was that?

A. That was at the time, I think, when the second award was made to Captain Weidemann. That was possibly six months or so later.

The COURT: Q. When did you first hear that Weidemann was making a claim?

A. At the time that Captain Astrup called me up at my work and asked me if I recalled the accident.

Q. How much later was that?

A. That was about two years later.

Q. In other words, you did not know that Weidemann had made a claim until two years afterwards?

A. About two years afterwards.

Mr. RESLEURE. That is all.

Mr. MURMAN: I concur in the questions asked by Mr. Resleure.

Redirect Examination

Mr. GILL: Q. Will you tell the Court the occasion of your [43] going to Mr. Tichenor's office?

A. I was employed by the Pacific Gas & Electric Company and I got a 'phone call in the office one day asking me if I would go to the Alaska Packers Office, which was right around the corner from there, that they were having a little hearing in regard to this particular accident. I said I would. I went over there and as I arrived in the office Mr. Tichenor was there, and Mr. Gill was there, and

(Testimony of Ernest Califro.)

Captain Klotz, and Captain Weidemann and Doctor Robinson. It was a sort of a round table conference, as I recall it. They questioned one another back and forth in regard to the accident, and what actually took place. That is the only thing that was taken up at that meeting.

Q. Have you any recollection sufficient to justify your saying what Weidemann told us that day?

A. That I don't recall.

Mr. RESLEURE: Q. What day of the week was it that this accident took place, if you remember?

A. I don't remember that.

Q. It was a week day?

A. It was during the week.

Mr. GILL: Q. You saw Weidemann fall from the ladder into the hold of the "Nelson"?

A. Yes, I did.

Q. What happened after that?

A. Captain Klotz had jumped across a keelson there—Captain Weidemann fell on the opposite side of this keelson, and I recall that Captain Klotz jumped over to his assistance.

Q. What did you and Klotz do?

A. We went over and tried to lift him up. He was unconscious. He was quite a heavy man. We could not move him. I proceeded and tried to make him comfortable. Captain Klotz went and got assistance to get him out of the hold of the ship. He ran along the dolphin line there to get assistance.

(Testimony of Ernest Califro.)

Mr. RESLEURE: Q. You had no contact with this case until some two years after the accident happened; Is that correct?

A. That is correct.

Q. And then your memory, as you are testifying to-day, is [44] based upon what you remember two years after the accident: Is that right?

A. Yes.

Q. You might have been mistaken as to some of the details?

A. It was pretty clear in my mind as it was. My memory is pretty good.

The COURT: Q. In other words, to the extent that you have testified, is that your recollection?

A. Yes, from my thoughts.

Mr. RESLEURE: Q. Might it not have been the 13th of November this accident occurred?

A. I don't think so.

ROY E. ASTRUP,

Called for the Plaintiff; Sworn.

Mr. GILL: Q. What is your name?

A. Roy E. Astrup.

Q. You are the superintendent of the Alaska Packers Association Shipyards at Alameda?

A. Yes.

Q. Captain, do you remember the occasion of the accident to Captain Weidemann when he fell into the hold of the "Metha Nelson"?

(Testimony of Roy E. Astrup.)

A. Yes.

Q. Will you tell the Court how it happened there were any operations aboard the "Metha Nelson" on that day, or any previous day, and what happened after he was brought back from the "Metha Nelson" to the hospital over there?

A. On or before November 14 I was instructed by our general manager to get the cubic content of the hold of the vessel. On the morning of November 14th I asked our draftsman, Mr. Califro, to go aboard and take the necessary dimensions and figure the capacity. I instructed him to go into the store-room and get our stock clerk, John Lyons, to assist him to take the dimensions, and he did. Mr. Califro and John Lyons worked on board the vessel that day. The next day he was going on board to finish up taking the dimensions and he went into the store-room and asked for John Lyons, and he could not get him at that time because he was busy. So I told him, [45] as long as he could not get John Lyons to get Weidemann or Klotz to assist him to take the dimensions. That is as far as I know of the case.

Q. The next day, Captain, when was it that you heard that Weidemann had fallen in the hold?

A. I was down at the plant of the General Engineering & Drydock Company in Oakland when I heard that Weidemann had fallen down in the hold.

(Testimony of Roy E. Astrup.)

Q. Do you know what was done for Weidemann at the shipyard?

A. Yes, he was taken from the vessel to our hospital in the yard and examined by the Alaska Packers doctor, and from there he was sent to the Peralta Hospital, in Oakland. I called up our general manager, Mr. Tichenor, and told him about the accident, and he instructed me to send him over to the Peralta Hospital, in Oakland.

Mr. RESLEURE: If the Court please, may it be understood that we make an objection to this line of testimony, which has nothing to do with extrinsic fraud. We do not want to interrupt counsel, but if we can have the one objection reserved to all questions outside of that it will be sufficient.

Mr. GILL: Q. Did Mr. Tichenor also tell you to send for Doctor Adams to take care of him?

A. Yes, he telephoned to Dr. Adams, and Dr. Adams arranged for the hospital.

Cross Examination.

Mr. MURMAN: Q. Were you employed by the Alaska Packers Association in November, 1929?

A. Yes.

Q. Do you recall the exact date of the accident?

A. Yes, I recall it.

Q. What was that date?

A. November 15.

Q. Were you so employed on that date?

A. I was employed there on that date, yes.

(Testimony of Roy E. Astrup.)

Q. What was the extent of your authorization as superintendent of the yard of the Alaska Packers Association?

A. I am supervising the work in the yard.

Q. Were you authorized to employ persons you deemed [46] necessary to help you in superintending the yard?

A. Yes, I believe I had that authority to employ any men that we need.

Q. Where did you get that authority?

A. Through the officials of our company.

Q. There was no question in your mind, then, that you could employ Captain Weidemann if you needed him to assist you in the yard?

A. I believe I could.

Q. Do you remember testifying before Mr. Pillsbury at the first hearing had in the latter part of January, 1930?

A. Yes.

Q. Were you sworn, when you took the stand, to tell the truth?

A. Yes, I was sworn.

Q. To the best of your knowledge you told the truth at that time?

Q. Do you remember testifying in response to this question:

"Q. You had asked him, referring to Captain Weidemann, I believe, to help the draftsman in measuring the 'Metha Nelson'?

(Testimony of Roy E. Astrup.)

"A. Yes, I told our draftsman to go aboard the 'Metha Nelson' and take some measurements in the hold, and I told the draftsman to go in the stock room to get one of the stock clerks to help him, and I told him, 'If you need any other assistance call on Weidemann', because his boat was lying right close by the 'Metha Nelson' and there was nobody else within quite a distance. It just happened he couldn't get the party to help him I wanted to go along with him and he got Captain Klotz, and I understand on the way down they met Captain Weidemann and asked him to go along. They could have got along without him, but I supposed the draftsman when I told him he could get Captain Weidemann if he wanted to, I suppose he thought he had to."

Do you remember testifying to that effect?

A. Yes.

Q. How did you happen to arrive at the conclusion that you understood that on the way down they met Captain Weidemann and asked him to go along?

A. I got the impression that Weidemann [47] had been asked to go along. That was my understanding of the case at that time.

Q. How did you get that understanding?

A. Because he was on board the vessel, he was on board the "Metha Nelson."

Q. Did anybody attempt to explain his being there?

(Testimony of Roy E. Astrup.)

A. No, we didn't look into that.

The COURT: In other words, no one said anything to you to cause you to testify that way. You concluded that, I presume, from the fact that you had given authorization for the employment in the event it was found necessary?

A. Yes.

Q. And you knew he could be found on the vessel in case he had to be employed?

A. Yes.

Q. That is the only basis you had for it?

A. Yes.

Mr. RESLEURE: That ends the case, your Honor, if this man just got that general understanding.

The COURT: Let us find out if there is any more evidence.

Mr. GILL: Q. You, Weidemann, and Klotz went over together from Alameda to Mr. Pillsbury's office on the morning of the hearing?

A. Yes.

Q. Who asked you to go?

A. I believe I was instructed by Mr. Tichenor.

Q. And the three of you went over together?

A. Yes.

Mr. MURMAN: Q. Captain, do you know whether or not the Alaska Packers attempted to get in touch with Mr. Califro to have him appear before Mr. Pillsbury?

(Testimony of Roy E. Astrup.)

A. No, to my knowledge they did not try to get in touch with him until after the second award was made.

Q. Do you know of your own knowledge of any attempts made on the part of Captain Weidemann to dissuade Mr. Califro from appearing before Mr. Pillsbury at the first hearing in the latter part of January, 1930?

A. No.

Mr. RESLEURE: Q. You paid Captain Weidemann for this work he did on the "Metha Nelson," did you not?

A. No.

Q. Did you pay him for that work in connection with the [48] work that he had done on the "Star of Greenland"?

The COURT: I don't think we are getting anywhere by that, because the question is, What transpired prior to the accident?

Mr. MURMAN: I believe it is preliminary, your Honor, to show that there was a general understanding or agreement that Captain Weidemann could be used if Captain Astrup wanted him. He had been so employed before.

The COURT: The testimony is in the record so far as the authorization of Mr. Califro is concerned. You have tested out the situation from the standpoint as to whether any representations were made to this witness and there were not any. We know that from his testimony. In other words, we are establishing fraud here now.

Mr. RESLEURE: That is all.

AUSTIN K. TICHENOR,

Called for the Plaintiff; Sworn.

Mr. GILL: Q. You are the vice-president and general manager of the Alaska Packers Association?

A. I am.

Q. And as such you are in general superintendence over the shipyard as well as other operations in Alaska?

A. Yes.

Q. I will ask you whether or not you heard by telephone from Captain Astrup that Weidemann had fallen into the hold of the "Metha Nelson" and injured himself.

A. Mr. Astrup telephoned me that Weidemann had fallen into the hold and injured himself.

Q. Did you order him sent to the Peralta Hospital and that Dr. Adams should treat him?

A. Yes, I suggested sending him to the Peralta Hospital and employing Dr. Adams.

Q. During the time that he was in the hospital did you ever visit him at the hospital?

A. I visited him, I think, on two occasions in the hospital.

Q. During the visits to the hospital did you ever have any [49] conversation with Weidemann as to what he was doing at the time he was injured?

A. Yes, we discussed his case in a general way, and the captain explained to me that he was assisting in taking measurements of the "Nelson" and was injured.

(Testimony of Austin K. Tichenor.)

Q. You knew, did you not, that Astrup occasionally had called upon Weidemann to assist him when he needed him?

A. Well, I imagine so. Astrup has that authority, to call on different people.

Q. I will ask you whether or not, as vice-president and general manager, it is within your exclusive authority to determine what shall be done in regard to disputed claims?

Mr. RESLEURE: I object to the question as calling for his opinion.

The COURT: He can state his opinion as to what authority he has.

A. I have about the only authority in that regard, I imagine.

Mr. GILL: Q. In other words, you take entire charge of all accidents that happen?

A. Yes.

Q. Is it or is it not your practice when someone is hurt to either send him to the State Industrial Accident Commission or to Mr. Pillsbury, depending upon where the accident took place?

A. That is the method, yes.

Q. And that ordinarily is done when someone is injured, you send them over there and allow Mr. Pillsbury to proceed: Is that correct?

A. Yes.

The COURT: Q. Mr. Astrup telephoned to you that Captain Weidemann had been injured on board this boat?

A. Yes.

(Testimony of Austin K. Tichenor.)

Q. He did not tell you that he was at that time employed by your concern, did he?

A. Yes, he did. I said, "What was Weidemann doing on the boat?" He told me he was down helping the boys take some measurements.

Q. Then afterwards you visited Weidemann at the hospital and he told you that he was making measurements for the [50] Alaska Packers?

A. Yes, he told me he was helping the boys take measurements there.

Q. And that during that period he got injured?

A. Yes.

Mr. GILL: Q. After Captain Weidemann was released from the hospital did he come over to the office in San Francisco?

A. Yes, he called on me in San Francisco.

Q. What did he tell you then, if anything, about the accident, and what did you advise him to do with regard to going to Mr. Pillsbury?

A. He told me, he repeated the story, and I suggested he had better go down and see Mr. Pillsbury and have his case adjusted.

Q. In pursuance of that did you write certain letters to Mr. Pillsbury in regard to the Weidemann claim?

A. Yes, I wrote to Mr. Pillsbury.

Q. Do you know whether or not the application for adjustment of the claim which Captain Weidemann filed with Mr. Pillsbury was actually made out by one of your employees?

A. I think Mr. Robinson in the shipyard made out one.

(Testimony of Austin K. Tichenor.)

Q. Did you receive from Mr. Pillsbury the usual form of notice? I think I will put this in evidence, your Honor. Is that your signature?

A. Yes, it is.

Q. That is the letter of December 20, 1929. And is this your signature?

A. Yes.

Q. That is the letter of December 27, 1929. Is this your note?

A. Yes.

Q. That is all in your handwriting?

A. That is all in my handwriting.

Q. That is on the Commission's form No. 207. "We desire to pay this man until decision and award is made. Alaska Packers Association, Tichenor." That is the claim. It is written across the face of the form. Is that your letter of December 30, 1929?

A. Yes.

Q. Is that also your signature?

A. Yes. [51]

Q. You recognized, when you signed this form, that you were admitting all the facts in regard to this case, did you not?

A. I signed it; I imagine I did.

The COURT: Q. In other words, you believe those facts at the time were true and you signed it?

A. I did.

Mr. GILL: Q. And was the basis of your belief what Captain Weidemann had told you?

A. It was the captain's story of how he was injured by us.

(Testimony of Austin K. Tichenor.)

Mr. GILL: That is all. I think I would like to have these in evidence.

The COURT: That is for you to do. You may wish to read them into the record.

Mr. GILL: I will read in the answer. That is about all I care for. "U.S.Form 207". Across the face of it is written, "U.S. Employees' Compensation Commission. "We desire to pay this man until decision and award is made. Alaska Packers Association, A. K. Tichenor, V. P. & G. M." There are a number of questions. The form is the Notice to the Deputy Commissioner that the claim will be controverted. All of the questions in regard to the controversy are left blank. Apparently the only answer to the form is the admission written across its face. Form 215 is the answer of the employer or insurance carrier to the Employees' Claim for Compensation. It is entitled "Frank Weidemann v. Alaska Packers Association, Employer. No insurance carrier. The employer, or insurance carrier, above named, for answer to the claim respectfully shows:

"1. It is denied—admitted"—and "denied" scratched out—"that applicant sustained an injury on or about the date set forth in the application.

"2. It is admitted—denied"—and "denied" scratched out—"that both the employer and employee were subject to the Longshore and Harbor Workers Compensation Act at the time of the alleged injury. [52]

(Testimony of Austin K. Tichenor.)

"3. It is admitted—denied"—and "denied" scratched out,—"that the relationship of employer and employee existed at the time of the injury.

"4. It is admitted—denied"—and "denied" scratched out—"that at the time of the alleged injury the employee was performing services growing out of and incidental to his employment.

"5. It is admitted—denied"—and "denied" scratched out—"that notice of injury was given to the employer as specified in the application.

"6. It is admitted—denied"—and "denied" scratched out—"that the applicant was permanently disabled to the extent stated in the application.

"7. It is admitted—denied"—and "denied" scratched out—"that applicant was temporarily disabled for the period stated in the application.

"8. It is admitted—denied"—and "denied" scratched out—"that the rate of wages as set forth in the application is correct."

9 is a note in typewriting: "Please see our letter to Mr. Warren Pillsbury dated December 27, 1929, regarding circumstances in connection with above injury. Alaska Packers Association, A. K. Tichenor"

The COURT: Q. The whole substance of that is this, that you on behalf of your corporation made these representations, that this man was employed by you and was injured during the course of his employment?

(Testimony of Austin K. Tichenor.)

A. Yes.

Q. And you did it on the basis of the statements made by Mr. Astrup, who was in your employ, and also on the statements of Mr. Weidemann. Now, let me ask you this in all candor: You assumed he was employed when Captain Astrup spoke to you, did you not?

A. I assumed so, yes.

Q. You did not approach Mr. Weidemann with the idea of confirming that, did you, or of placing reliance on his state- [53] ments at that time, did you?

A. No, I took it for granted and I was thoroughly convinced of it at that time.

Q. You had no question about it?

A. I had no question about it.

Q. As a matter of fact, you depended on your subordinate, did you not?

A. Yes.

Q. You did not depend upon Mr. Weidemann's statement, you depended on Mr. Astrup's statement to you?

A. That he was working for us, yes, and on the statements of Captain Weidemann that he was taking certain measurements.

Q. Didn't you actually depend on Mr. Astrup?

A. In sending him to the hospital I did, yes.

Q. And in making the claim did you not accept his statement, and were you not satisfied at that time and at all times that Weidemann was actually employed?

(Testimony of Austin K. Tichenor.)

A. I was, yes.

Q. In other words, you didn't go out trying to round up evidence?

A. No.

Q. It was more a matter of sympathy?

A. I knew both of these men for years.

Q. It was more a matter of friendliness that you visited him?

A. Yes.

Q. But as a matter of fact, even though his statements might be false they didn't affect you in making the representation to your company?

A. No, not at that time.

Q. You relied upon your subordinate, Captain Astrup, did you?

A. I did.

Cross Examination

Mr. RESLEURE: Q. I would like to ask one question in addition to what the Court has asked. When you visited Mr. Weidemann in the hospital he was quite sick, was he not?

A. No, I would not say so. He had his hand in a sling; outside of that he was in very good shape.

Q. Do you remember writing on December 27, 1929 to Mr. Pillsbury a letter of which this is a copy?

A. Yes, I [54] remember writing this letter.

Q. Do you remember writing the statement in there: "Captain Weidemann I am quite sure will not be able to attend the hearing on the 7th of

(Testimony of Austin K. Tichenor.)

January. In addition to his injury we believe he is suffering from some heart ailment."

A. Yes, the doctor told me he thought his heart was in bad shape.

Q. Does that refresh your recollection in any way as to Captain Weidemann's condition when you visited him in the hospital?

A. I recall Captain Weidemann's condition very well. Captain Weidemann has an enormous hand. He had that hand on a board. I was looking at his hand more than anything else. I never saw such a hand on a human being. Outside of that the man was entirely conscious and talked and discussed things. We laughed and chatted about seagoing matters that we were both interested in.

Mr. MURMAN: Q. Captain Astrup was authorized by your corporation to employ whomever he thought necessary to help him over in the yard: Is that correct?

A. Yes, he had that authority.

Q. When you discussed the accident with Captain Astrup did he mention any of the details regarding who he had attempted to employ and who he delegated that authority to?

A. A few days previous to this I told Mr. Astrup to take certain measurements. I asked him to have these measurements taken, which he did—that is, I imagine he did. Then a few days after that he telephoned me again that Captain Weidemann had been injured in the "Metha Nelson." I said, "What

(Testimony of Austin K. Tichenor.)

is Weidemann doing in the "Nelson," he belongs in the "Shetland." He said, "I asked Captain Weidemann to assist the boys in taking those measurements."

Q. He told you that?

A. Yes.

Q. Did he tell you who he had asked to ask Captain Weidemann?

A. No, he didn't say that. [55]

Q. Did you inquire?

A. I didn't inquire.

Q. In other words, you took his statement as sufficient?

A. I took his statement as sufficient.

The COURT: Q. You don't know whether he sent somebody else to employ him?

A. No, I don't know. I wanted to take care of this man if he was injured in our employ. I sent him to a private hospital and had a private room for him and a nurse.

Q. That was when you were under the impression that he was an employee of yours?

A. Yes.

Mr. MURMAN: Q. You were satisfied with the statement that Astrup made to you about Captain Weidemann being on the "Nelson" on the day of the accident?

A. Yes.

Q. And about his employment by him?

A. Yes.

(Testimony of Austin K. Tichenor.)

Q. Do you recall a telephone conversation with Mr. Pillsbury in regard to the first hearing in the matter?

A. I know I telephoned to Mr. Pillsbury, yes.

Q. Do you remember one particularly that took place on the morning of January 27, 1930?

A. I don't recall it. Probably if I glanced over it I could remember it.

Q. We have not any record of the conversation except Mr. Pillsbury's statement to this effect: "I telephoned Mr. Tichenor this morning to ascertain if he wished to be represented at this morning's hearing. His reply was that he did not think it necessary to be represented and wished to submit the matter for decision upon the statements of witnesses to be taken this morning in his absence."

A. Yes, I remember that.

Q. Did you know what witnesses Mr. Pillsbury referred to?

A. I didn't know. I imagine Mr. Astrup, and the man that had taken the measurements with him.

Q. Did Mr. Astrup attend at your solicitation?

A. I don't know whether I instructed him to attend, or not, but I imagine I did.

Q. In other words, you were satisfied that whoever was going [56] to appear before Mr. Pillsbury would present the matter in its fullest extent?

A. I didn't question the thing, at all. I was convinced this man was hurt in our employ at that time.

(Testimony of **Austin K. Tichenor.**)

Redirect Examination.

Mr. GILL: Q. You have identified your signature to the letter of December 20, 1929, on the letterhead of the Alaska Packers Association.

A. Yes.

Q. When you wrote this letter and said that the employees of the Alaska Packers Association on the "Metha Nelson," under suggestion of the Superintendent of the Alaska Packers Association called to Weidemann aboard his vessel asking him to give them a hand holding a tape line to make certain measurements, where did you learn about that tape line?

A. I think that Mr. Astrup told me that. When he telephoned to me that Weidemann had been hurt on board the "Metha Nelson" I asked him what was Weidemann doing on the "Metha Nelson," and he said, "I asked the boys measuring her at your request to get Weidemann, and Weidemann was holding a tape line for them." Astrup told me that and I was convinced of it, myself.

Mr. GILL: That is all.

The WITNESS: I would like to qualify that a little bit, too, if I could. This is dated the 20th of December. I think when I called on Weidemann in the hospital Weidemann told me that he was holding the tape line for those boys and had been working there all the morning.

The COURT: Q. Did you get those statements from Captain Astrup first?

(Testimony of Austin K. Tichenor.)

A. Yes, I got them from Captain Astrup first and then from Weidemann.

Q. Astrup told you that, and when you visited Weidemann he gave the same statement as the statement of Astrup?

A. Yes.

Q. But you were not going there interrogating him?

A. No.

Q. You were not going there as an investigator?

A. No.

Mr. MURMAN: Q. In response to that letter you received a letter from Mr. Pillsbury, did you sending you the forms necessary to make the proper claim?

A. Attached to this [57] letter from Mr. Pillsbury it is suggested that I fill out and forward to him Form 202.

Q. You remember getting that letter, do you?

A. I don't remember getting it, no, but I imagine I did that at Mr. Pillsbury's suggestion.

Q. Do you remember writing a letter dated December 27, 1929?

The COURT: I cannot see the necessity of going into all these details, because this witness does not hesitate to say that he represented to the Commission that this man was employed by them and he was doing certain things in connection with his employment and felt that probably there was a

(Testimony of Austin K. Tichenor.)

responsibility, although he questioned whether it was not more than 50 per cent.

Mr. MURMAN: The only purpose is to bring out that Mr. Tichenor, who was directly over Captain Astrup, was entirely satisfied that Captain Astrup had employed Captain Weidemann.

The COURT: If we are to believe the testimony of Mr. Tichenor that is correct, because he says he was satisfied. Naturally, he received it from the man immediately under him, who operated the plant under him. He says he told him those facts and he accepted them as true. He is not an investigator, as he says. What is it you want to bring out?

Mr. MURMAN: Our theory is that Captain Astrup was acting under the direct authority of the corporation.

The COURT: How is that in question here? Captain Astrup has said that he had authority to employ. Mr. Tichenor says he gave him authority to employ. The only question is, Was he employed? There has been nothing offered here to show there was not a right in Mr. Califro to act.

Mr. MURMAN: That is all.

The COURT: The whole issue is whether he was employed at the time of the occurrence. [58]

ARNOLD KLOTZ,

Called for the Plaintiff Sworn.

Mr. GILL: Q. You were, in November, 1929, employed by the Alaska Packers Association?

A. Yes.

Q. As master of the "Kanak"?

A. Yes.

Q. Where was the "Kanak" on November 15, 1929?

A. She was lying close to the blacksmith shop in the Alameda Shipyard of the Alaska Packers Association.

Q. I will ask you to tell the court what happened on the morning of the accident to Captain Weidemann when he fell into the hold of the "Metha Nelson," what you were doing, and, more or less, if you can, from minute to minute or hour to hour, tell a consecutive story to the Court as to what happened on that day.

A. I was working on the steamer "Kanak" doing regular routine work like I do every day, when Mr. Califro passed by the steamer "Kanak" and asked me if I had seen Captain Weidemann. I said "No, he must be on the 'Star of Shetland.'" So he asked me if I was going to give him a hand to take some measurements on the "Metha Nelson." I said, "I sure will." So he walked toward the office and I put my tools away. We walked toward the "Metha Nelson", and took off the hatches, and took the measurements that same morning. At noon we went for lunch, I want to the steamer

(Testimony of Arnold Klotz.)

"Kanak" to cover up the hatches again for safety sake, so nobody could fall down, and I ate my lunch on the "Kanak." So in the Afternoon Mr. Califro said to me to come over again and finish the job up. So I did. On the way over I sighted on the gangway of the "Star of Greenland" Captain Weidemann——

The COURT: Q. Were you with Mr. Califro at that time?

A. No. Mr. Califro was on board the ship.

Q. He had spoken to you and had gone on board the ship and you came along later?

A. That happened in the afternoon.

Q. I am talking about the afternoon.

A. Yes. [59]

Q. You came along after him.

A. Yes.

Q. And then you saw Captain Weidemann?

A. When I seen Captain Weidemann in the gangway, or near the gangway, I said to him that somebody was looking for him. He said, "I know who that was." I proceeded on board the "Metha Nelson."

Q. Did you tell him that they were looking for him to assist in taking the measurements?

A. No, I just told him that somebody was looking for him.

Q. Tell what happened?

A. We proceeded with the measurements on the "Metha Nelson" and we were almost finished, and

(Testimony of Arnold Klotz.)

Captain Weidemann appeared on deck. I was standing down below in the hold. Captain Weidemann said something, I didn't pay much attention to it, and later on he came down the ladder——

Q. When he said something whom did he speak to?

A. He spoke to me.

Q. Did Mr. Califro say anything?

A. No. Califro was in the after part of the ship. He was doing something about the measurements. So he proceeded down the ladder and I think when he was three rungs from the keelson all of a sudden I turned around and Captain Weidemann fell down in the hold. I proceeded, after I saw him, and he was pretty badly hurt, the way it looked to me, and he was unconscious. I said to Mr. Califro to watch him and I proceeded to get medical assistance. I notified Mr. Roberts, in the yard office. They had some help and we carried Captain Weidemann out of the hold into the yard hospital. Later on the ambulance took him away. That is about all I can remember.

Cross Examination.

Mr. RESLEURE: Q. By whom are you employed at the present time?

A. The Matson Navigation Company.

Q. How long since you left the Alaska Packers' employ?

A. Since about the middle of March, 1933.

(Testimony of Arnold Klotz.)

Q. After the accident did you make a report of it to anyone connected with the Alaska Packers Association?

A. I [60] wrote out a statement at a round table meeting. Captain Weidemann was present, Mr. Astrup, Mr. Califro and Mr. Tichenor——I think it was Mr. Tichenor——in fact, everybody was present concerning that accident.

Q. When was this?

A. That was about two years ago.

Q. About how long after the accident would you say?

A. About two years after the accident.

Q. About two years after the accident?

A. Yes.

Q. Didn't anyone ask you as to what had occurred to Captain Weidemann shortly after the accident? Shortly after the accident did not anybody ask you what had occurred to Captain Weidemann?

A. Nobody asked me any question that day, nobody never asked me any question.

Q. Did I hear you correctly that somebody asked you and you said "I didn't know anything about it"; is that what you said?

A. What day do you mean?

Q. On the day of the accident.

A. On the day of the accident I told my story just exactly the way it happened.

Q. To whom did you tell your story?

(Testimony of Arnold Klotz.)

A. In the yard office. I cannot remember who was there in the yard office. I think Mr. Roberts was there at all times.

Q. So you told Mr. Roberts in the yard office?

A. That Captain Weidemann was hurt.

Q. Did you tell him the story just the way you have told it to-day?

A. Absolutely.

Q. And you gave him the same information that you have given to the Court to-day?

A. Yes.

Q. What is the position of Mr. Roberts?

A. He is the bookkeeper of the Alaska Packers yard.

Q. Was there anyone else present at that time besides Mr. Roberts and yourself?

A. I wrote my statement out on board the ship. [61]

Q. When was it you wrote your statement out on board the ship?

A. After the round table meeting. After everybody was present I went on board the ship and wrote out a statement and gave it to Mr. Roberts to be sent over to Mr. Astrup, or to the Alaska Packers office.

Q. This was shortly after the accident?

A. No, that was not shortly after the accident.

Q. You think I am referring to two years after?

A. Yes.

Q. I am referring to shortly after the accident, did you talk to Roberts then?

(Testimony of Arnold Klotz.)

A. I didn't talk to anybody shortly afterwards.

Q. You didn't have any conversation with Captain Astrup?

A. With Mr. Pillsbury, if I am not mistaken.

Q. Did you talk to him before you gave your testimony at the hearing?

A. I didn't talk to anybody before that.

Q. You remember your testimony that you gave before Mr. Pillsbury, don't you?

A. I remember it.

Q. That was given about January 27, 1930?

A. Something like that; it was shortly after.

Q. Do you remember testifying in January, 1930 before Mr. Pillsbury, as follows—before I ask you that question, Mr. Califro asked you to find Captain Weidemann, did he not?

A. No, sir, at no time. He never asked me to.

Q. Who asked you to find Captain Weidemann?

A. Nobody.

Q. What made you talk to Captain Weidemann about the work on the "Nelson"?

A. It was natural I should do that, because in the forenoon Mr. Califro asked me if I had seen Captain Weidemann, but he never asked me to say anything to him.

Q. You were very busy on the "Kanak"?

A. We were not exactly busy, but we have to do the routine work.

Q. Reading from page 18 of the testimony before the Commissioner:

(Testimony of Arnold Klotz.)

"Q. What do you know about Captain Weidemann's injury? [62]

"A. I was on the steamer 'Kanak' and I had done a little work, and at that time I did not know the fellow was a draftsman in the yard of the Alaska Packers, but he came up to me and asked if I knew where Captain Weidemann was, and I said, 'Yes, he must be on the "Star of Shetland." ', and he said, 'Well, I couldn't find him.' That is all he said, and he walked away again.

"Q. That is the draftsman?

"A. Yes. About a half hour later he came up to me again and he said he had to get the measurements on the 'Metha Nelson,' and asked if he couldn't find Captain Weidemann if I wouldn't give him a hand, and I said, 'Absolutely,' and I kept on working, as I had some tools I just put away, and he walked away toward the yard, not toward the ships. About ten minutes later I walked over to the 'Metha Nelson' and on the way over Captain Weidemann was standing in the gangway of the 'Star of Greenland.' He was just ready to leave the 'Star of Greenland' and I told him a man was looking for him, and he said, 'Oh, I know who that is. We were working yesterday morning.' I said, 'He wanted you to go in the "Metha Nelson." ' So Captain Weidemann said, 'All right, we will go,' and we both of us went on board the ship, but there was no draftsman there. His plans was lying down and we sat down on the hatch, both of

(Testimony of Arnold Klotz.)

us, and talked about fifteen minutes. First we looked around if the draftsman was anywhere to be seen on board the ship, but we couldn't see him, so we sat on the hatch and waited. The draftsman was the first one to enter the hold. He went down in the 'Metha Nelson.' I was the second, and Captain Weidemann was coming last down in the hold, and I looked at him"—— Do you remember testifying along those lines before Mr. Pillsbury?

A. There is some discrepancy in certain parts in there. In the first place, I was down in the hold, I was down in the hold working with the draftsman [63] in the forenoon.

Q. Why did you tell Mr. Pillsbury that you went down with Captain Weidemann?

A. Well, I don't know anything about that. I was down in the hold. It was not necessary for three men to take the dimensions of the "Metha Nelson."

Q. How long after you went down the hold did Captain Weidemann follow you?

A. That I cannot exactly say. Captain Weidemann must have come from the "Star of Greenland." That must have been around three o'clock, anyway, when he came on board the ship and the measurements were almost finished.

Q. Did you walk with Captain Weidemann down to the ship, to the "Metha Nelson"?

A. Not that I remember.

Q. Did you testify before Mr. Pillsbury that you walked down with him?

(Testimony of Arnold Klotz.)

A. Well, I don't know anything about that.

Q. Was Mr. Califro present on the ship when you arrived there?

A. He was on the after part of the vessel.

Q. Do you remember testifying as I have read to you, that Mr. Califro was not there?

A. I don't know anything about that. Mr. Califro was in the vessel.

Q. Do you remember anything about those plans that you testified to as lying down on the hatch?

A. They were not on the hatch, they were on the keelson. All the tools were on the keelson.

Q. Do you remember now sitting down and talking with Captain Weidemann awaiting Mr. Califro?

A. I don't see, in the first place, any reason why we should wait for Mr. Califro.

Q. Do you remember sitting down with Captain Weidemann waiting for Mr. Califro?

A. I can't remember that.

Q. Can you explain in any way why you are testifying differently here from what you testified before Mr. Pillsbury?

A. As I said already, there is some discrepancy in the testimony, in the first place. Also there is a discrepancy in the time in here. [64]

Q. Is it not true that Mr. Califro went down into the hold and that you followed shortly thereafter, and that Weidemann came down last, and it was all part of the same trip down to the hold?

(Testimony of Arnold Klotz.)

A. That is probably the way it was, that Mr. Califro was in the hold and I went in second, and so afterwards came Captain Weidemann, and he was the last one which came into the hold. That is probably the way the testimony was taken down.

Q. Was Mr. Califro in the hold before you got on the ship?

A. Yes.

Q. You have testified to when you arrived on the ship, that when you arrived Mr. Califro was in the after part of the ship.

A. He was in the hold.

Q. Which hold?

A. In the hold of the "Metha Nelson."

Q. How many holds has the "Nelson"?

A. There is only one hold, but there are two hatches.

Q. So that Mr. Califro may have come from the after hatch of the ship in the hold and arrived at the hatch where Captain Weidemann fell down; is that your point?

A. Mr. Califro was doing some writing in the after part. There are two hatches. We had taken off the No, 2 hatch. The main hatch is No. 1 and the other one is No. 2. He probably was underneath there writing. We had taken some measurements. Then Captain Weidemann came down in the hold. He probably didn't see it, I don't know anything about that. I was close to Captain Weidemann and Mr. Califro.

(Testimony of Arnold Klotz.)

Q. Is it not a fact you waited for Mr. Califro and then he went down the hold?

A. No, sir.

Q. I will ask you whether or not you remember testifying before Mr. Pillsbury as follows:

"Q. After you got there the draftsman——

"A. We never went in the hold until the draftsman came. The draftsman was first and I was second and Captain Weidemann was the last to come down the hold, and I looked at [65] him as he entered the hold, and he just got his head inside the hold and all of a sudden he simply fell down almost in front of me." Did you so testify before Mr. Pillsbury?

A. I did testify that Captain Weideman came in the hold.

The COURT: Q. The point is this, if you did so testify at that time it is not correct. The fact is you went down first?

A. I was down there first.

Q. And you didn't know he was on board until Weidemann spoke to you?

A. Weidemann spoke to me from the deck.

Q. That was the first time you knew he was on board?

A. That is the first time that I can remember.

The COURT: We will take a recess until half past one, if that is agreeable to counsel.

(A recess was here taken until 1:30 o'clock p.m.)

[66]

(Testimony of Arnold Klotz.)

AFTERNOON SESSION.

ARNOLD KLOTZ,

Cross-examination (Resumed).

Mr. RESLEURE: Q. Captain Klotz, didn't you testify before Mr. Pillsbury as follows:

"Q. What did the draftsman say to him when the dratfsman came?

"A. The draftsman did not say anything then, so on account I was there I said to Captain Weidemann, "I guess we will stay here, too," and I had done a little work on the ship and I had put my tools away, and it was getting toward afternoon, anyway. I think it must have been around 2 or 2:30. I said, "We had just as well stay here," and I was going to stay with Captain Weidemann and the draftsman if they needed my assistance, to give them any help." Did you so testify before Mr. Pillsbury?

A. I testified before Mr. Pillsbury something like that, as I remember.

Q. What did you mean when you said, "We had just as well stay here, and I was going to stay with Captain Weidemann and the draftsman if they needed my assistance, to give them any help"; what did you mean by giving them any help?

A. Well, I cannot see, in the first place, why I should make a statement like that.

The COURT: The question is, did you say it, though?

A. Not that I remember.

(Testimony of Arnold Klotz.)

Mr. RESLEURE: I will show you the transcript of your testimony——

The COURT: You have read to him what apparently is the transcript, unless the other side wishes to contest it. We have not any proof that that is the transcript. The other side does not question it, I suppose?

Mr. GILL: No, your Honor.

The COURT: Q. Do you say you did not testify that way?

A. There must be some discrepancy in that statement; even [67] the time is mixed up in there.

Q. At any rate, it is not true?

A. It is not true; part of it is true and part of it is not.

Mr. RESLEURE: Q. The part that is not true, who induced you to testify to the part that is not true?

A. Nobody ever induced me to, everything is under my own free will.

Q. It was not Captain Weidemann who induced you to testify that way before Mr. Pillsbury?

A. Nobody ever said a word to me.

Q. Did you see Captain Weidemann between the time of the accident and the time of the hearing before Mr. Pillsbury?

A. I seen him in the yard.

Q. Did you have any conversation with him?

A. No, sir. The only time I did have a conversation with Captain Weidemann was the one over on

(Testimony of Arnold Klotz.)

the boat we came from Alameda with Astrup and myself and Weidemann. Captain Weidemann said to me on the boat that I had given him orders to go on the "Metha Nelson." I said to him "I have no authority, in the first place." Then Captain Weidemann spoke up and said, "I would not take any orders from you, anyhow."

Q. When was that?

A. That was on the bay, coming over.

Q. About what time?

A. When Captain Weidemann came on the boat. I think Captain Weidemann remembers the statement he made to me.

Q. But Captain Weidemann never asked you or never induced you to make any kind of a statement before Mr. Pillsbury?

A. No, sir.

Q. Were you present at the hearing before Mr. Pillsbury, at the end of your testimony, when Mr. Pillsbury said to Captain Weidemann: "Do you remember the draftsman coming on board?

"Captain WEIDEMANN: No, sir, I looked for him, I don't know his name.

"Mr. PILLSBURY: You don't remember him coming? [68]

"Captain WEIDEMANN: No, I don't even know he was down in the hold.

"Mr. PILLSBURY: Were you unconscious after your injury?

"Captain WEIDEMANN: Yes. I didn't know anything about it until they hauled me out."

(Testimony of Arnold Klotz.)

Do you remember Captain Weidemann giving that testimony?

A. Well, I didn't pay much attention to Captain Weidemann's testimony at all, I didn't listen much to him.

Q. If you heard it you didn't contradict him, did you?

A. I didn't pay no attention to his testimony, at all.

Q. Is it not likely, Captain Klotz, that the testimony that you gave before Mr. Pillsbury about two months after the accident is more accurate than the testimony you are giving to-day?

A. Well, the way I give the testimony to-day is to the best of my recollection.

Q. Was not the testimony you gave Mr. Pillsbury to the best of your recollection?

A. Whatever I gave there is the same way I stated, but there was a discrepancy in time and somebody is mixed up in the time in the first place.

Q. Don't you think if there is a discrepancy in your testimony to-day, four years after the accident, and the testimony you gave two months after the accident, it is more likely that the testimony you gave two months after the accident is correct?

A. I think the testimony I am giving now is absolutely correct. I am not interested one way or the other in either case, neither in Mr. Weidemann nor in the Alaska Packers. I am not interested in either case.

(Testimony of Arnold Klotz.)

Q. Were you under oath when you testified before Mr. Pillsbury? Had you been sworn to tell the truth?

A. I don't think so.

Q. You can't remember back as far as four years?

A. I don't think so. [69]

Q. You don't know, do you?

A. I don't think so.

Q. It is very difficult to remember things that happened four years ago, is it not, Mr. Klotz?

A. The accident I remember plainly. I know Captain Weidemann came down the hold and fell down, and I went for medical assistance. That is all I am interested in or concerned about.

Q. Those things that you just testified to, those are the things that are very plain and distinct in your mind, the accident, itself?

A. One thing I say is this, I never asked Captain Weidemann to come on board and give us a hand.

Q. Why did you so testify to Mr. Pillsbury?

A. I don't think I said so. Captain Weidemann wouldn't take any orders from me in the first place, I have not got any authority.

Mr. GILL: Q. With regard to this testimony before Mr. Pillsbury, toward the end of the testimony you said: "The draftsman and myself rolled Captain Weidemann over. He fell down on his side. He had *on* leg underneath his body and we

(Testimony of Arnold Klotz.)

straightened everything out and he was absolutely unconscious, and we rolled Captain Weidemann over on his side, and I hurried up on deck to get medical assistance. There was nothing carried away. The ladder was solid as far as I know."

Were you in the hold at the time that Captain Weidemann fell?

A. Absolutely I was in the hold when Captain Weidemann fell.

Q. Had you previously been engaged with Mr. Califro in making measurements in the hold?

A. Mr. Califro was in the after part of the ship.

The COURT: Q. He wants to know if on the afternoon when you came back and before Captain Weidemann fell you had been taking measurements?

A. Yes, we had been taking measurements in the forenoon.

Q. That afternoon had you taken any measurements?

A. Yes, that afternoon. [70]

Q. How long had you been working taking measurements before you saw Captain Weidemann?

A. I went over there after I had lunch and I think I must have been there half an hour, or something like that.

Q. Half an hour before Captain Weidemann turned up?

A. Yes.

(Testimony of Arnold Klotz.)

Mr. GILL: Q. Do you recall also when you made the measurements in the morning it was only necessary to remove two or three or four of the planks off the hatch?

A. I think we took all the hatches off—no, I know now as a fact that in the main hatch we only took off one of each side. When we took up Captain Weidemann we had to remove that other hatch. There was one on each side off on the main hatch.

Q. The hatch was just about a foot above the deck?

A. Yes.

Q. How far below the dolphin line was the deck of the "Metha Nelson"?

A. I should imagine about ten feet.

Q. So that anyone walking from the "Greenland" to the "Shetland" along the dolphin line passed the "Metha Nelson" and looked down upon the deck with its open hatch: Is that correct?

A. That easily can be seen.

Q. The deck and the hatch were below the dolphin line?

A. Yes.

Q. And the "Greenland" was on one side of the "Metha Nelson" and the "Shetland" on the other?

A. Yes.

Q. Had you ever, throughout your employment with the Alaska Packers Association been instructed or authorized to employ anyone on behalf of the Alaska Packers?

A. At no time.

Mr. RESLEURE: I would like to ask permission to recall Mr. Tichenor. If counsel will stipulate to the two letters going into evidence it will not be necessary to recall him. We would like to offer in evidence in connection with Mr. Tichenor's testimony two letters, one dated January 8, 1930, from Warren H. Pillsbury to the Alaska Packers Asociation; [71] also a letter of January 14 from the Alaska Packers Association to Mr. Warren H. Pillsbury, signed by Mr. Tichenor.

Mr. MURMAN: I ask that they go in in behalf of the defendant Pillsbury, also.

The COURT: They will be received as Defendants' Exhibits 1 and 2.

FRANK WEIDEMANN

Called for the Plaintiff; Sworn.

Mr. GILL: Q. You are Captain Frank Weidemann?

A. Yes.

Q. In the month of November, 1929, up to the day of your accident, you were employed by Mr. Small, of Los Angeles?

A. Yes.

Q. As the master of the "Shetland"?

A. Yes.

Q. And you were the master of the "Shetland" on the day of this injury?

A. Yes.

(Testimony of Frank Weidemann.)

Q. Do you remember, Captain, testifying before Mr. Pillsbury?

A. Yes.

Q. You were present when Mr. Astrup and Captain Klotz testified?

A. Yes.

Q. I want to ask you to read, beginning line 5, and read down that page, and tell me whether or not you remember that testimony, commencing with line 5, being given by Captain Astrup?

Mr. RESLEURE: May I inquire, your Honor, if this is in connection with the impeachment of Captain Weidemann's testimony that he was the master of the "Shetland"?

Mr. GILL: No.

The COURT: What is the purpose of it?

Mr. GILL: Just to show that he was not asked except by Captain Klotz.

The COURT: Ask him that directly and find out. Unless he denies it there is no necessity of confronting him with this testimony. [72]

A. I don't remember that, at all.

Q. It was Captain Klotz whom you say told you to go aboard the "Metha Nelson"?

A. I will tell you the way it came——

Q. Just say whether it was Klotz.

A. Klotz was coming along the gangway when I was on the other ship, the *"Greeland,"* I took the inventory and had something to pass over. He said, "We are looking for you all afternoon, where

(Testimony of Frank Weidemann.)

have you been?" I said, "What do you want?" He said, "We are looking for you, we want you to go on the 'Metha Nelson' and help with measurements." I said, "I know about that, they were looking for me but they could not find me." I said, "All right, I will go." I was finished anyway on the "Greenland." Captain Klotz helped me down with the inventory books, and I had a five-gallon can of oil and some little things that I was going to take to the warehouse. We both went along to the "Metha Nelson". He said, "Well, I may as well stay here now because it is almost quitting time, there is no use going to work any more, I have put all my stuff away anyhow, I will go along with you." We went on board. One of us was hollering down the hold, "Anybody down there?"—either Captain Klotz or me. There was no answer. We were just taking a little spin around the ship, we talked about electricity and everything passing the time by. We were talking about old times for about five or ten minutes. Then we came and stood on the hatch coaming. I did spot those papers that were lying on the keelson and I told Captain Klotz, "Let us go down and see what is wrong with those things, what he is going to measure, etc." We were going to have a look at the paper. He said, "All right." He made a move to go down and he was down, and then I made a move to go down, and that is the way it happened. I must have knocked my head against the keelson or the hatch, or what-

(Testimony of Frank Weidemann.)

ever it was I fell on, because I had a scar on my head. I didn't fall on my head, I must have knocked myself unconscious on the keelson. That is all [73] I know. My God, I would die if that is not true. I have a good memory. That is the gospel truth. I am right. I am a good man. God damn it, I would die here if that is not the truth. He is a liar if he says different.

The COURT: Q. Did anyone speak to you about doing this work besides Klotz?

A. No. I had a witness—it's too bad that man is dead.

Q. Answer yes or no. Nobody spoke to you about doing this work on board this ship besides Klotz?

A. Yes, the day before, or maybe two days before, Mr. Astrup told me about it.

Q. What did Mr. Astrup say?

A. I don't know exactly the words, helping them along when they wanted it, etc. That was as much as he said. I didn't need to go to the office and ask their permission; that was a mutual understanding, it was asked me once. There were several times I was doing things.

Q. He simply said he would probably want you, or he would want you?

A. Yes.

Q. Which did he say?

A. He wanted me to help them when they needed it and I would have time enough to go in the

(Testimony of Frank Weidemann.)

"Greenland" and take the inventory books, and all that stuff.

Q. He didn't say anything more to you than that a day or so before?

A. No.

Q. And then when you saw Klotz, he is the only other one that spoke to you about it?

A. Yes, because they were hunting for me.

Q. What did he say?

A. He came along on the gangway and I was looking over the "Greenland"—I was not on the "Shetland", at all, I was on the *"Greeland."* It belongs to the Alaska Packers. I was going to go ashore. I had a bundle of books there and a five-gallon can. Klotz spotted me. He said, "My God, they are looking for you all over, they want you in the 'Metha Nelson' to take measurements." I says, "I [74] know what it is." Then he walked along with me. I was in the "Greenland" a couple of hours or three hours. It was right after dinner. This was about half past two or three o'clock.

Q. You didn't do any work on board the boat, you didn't do any measuring?

A. No.

Q. All you did was go there for the purpose of helping them?

A. Yes, to help them. I never saw the draftsman. We hollered down but there was no answer. When I fell down of course I didn't know. I didn't know the draftsman. Even a month or so afterwards when

(Testimony of Frank Weidemann.)

I came out of the hospital I went up to Mr. Tichenor's office and I didn't know that draftsman. He says he talked to me—he never talked a word to me.

Q. It is your opinion that you were employed under these circumstances?

A. Yes, sir.

Q. And that is why you told Mr. Tichenor?

A. Mr. Tichenor had nothing to do with that.

Q. But he came to see you?

A. Yes.

Q. That is the reason why you told him you were hurt while you were doing this work?

A. Yes. Mr. Tichenor visited me once or twice in the hospital and I was thanking him very much for him sending me to such a nice hospital, otherwise I would not have survived. That is all the talk I had with Mr. Tichenor.

Mr. RESLEURE: Q. Did Mr. Astrup, when he spoke to you a day or two days before mention that he would be needing you on the "Metha Nelson"?

A. Yes.

Q. Did he mention the "Metha Nelson" and these measurements?

A. Yes.

Q. And he said that he wanted you to go along?

A. Yes, that he said, because they had no men in the yard.

(Testimony of Frank Weidemann.)

Q. How did you know they had been looking for you?

A. Klotz came along.

Q. When Klotz came along you said, "I know what they want"? [75]

A. Because they told me a day or two before I was going to help them; that is how I knew they wanted me.

Mr. GILL: Q. Now, Captain, I want to read to you what was said in answer to a question asked by Mr. Pillsbury of Captain Astrup at the hearing before Mr. Pillsbury, when you were all there together. I am reading from page 17.

Mr. RESLEURE: We object to reading it unless it is to impeach the witness.

The COURT: Is that it?

Mr. GILL: Yes.

Q. Mr. Pillsbury asked this question of Captain Astrup:

"Q. Do you know anything about the accident, how he happened to get hurt?

A. I was in the yard at the time.

"Q. You had asked him, I believe, to help the draftsman in measuring the 'Metha Nelson'?

A. Yes. I told our draftsman to go aboard the 'Metha Nelson' and take some measures in the hold and I told the draftsman to go in the stock room to get one of the stock clerks to help him, and I told him, 'If you need any other assistance call on Weidemann', because his boat was lying

(Testimony of Frank Weidemann.)

right close by the 'Metha Nelson' and there was nobody else within quite a distance. It just happened he couldn't get the party to help him I wanted to go along with him, and he got Captain Klotz, and I understand on the way down they met Captain Weidemann and asked him to go along. They could have got along without him, but I suppose the draftsman when I told him he could get Captain Weidemann if he wanted to, I suppose he thought he had to.

"Q. You didn't ask him to go, then?

A. No."

Then Mr. Pillsbury turned to you, Captain Weidemann, and he said, "Who asked you to go on board the 'Metha Nelson' and you answered, "Captain Klotz."

A. Sure, I said that. The way Captain Klotz was talking, you must remember that, too, I can't use his language here, [76] "Where have you been keeping yourself all afternoon, they have been looking for you, they want you there." So I told Mr. Pillsbury at that time that Captain Klotz told me. He did in one way, yes.

Q. But you heard Captain Astrup say there that he had not asked you to go aboard the boat.

A. He didn't ask me that afternoon, no.

Q. But you heard him say that he had not asked you?

A. I don't remember that.

(Testimony of Frank Weidemann.)

Q. The direct question was asked Captain Astrup, "Did you ask him to go aboard the boat," and Captain Astrup said no.

A. Not that particular afternoon, no, because he was not there. He was in the shipyard, or somewhere—I don't know. He was in the United Engineering Shipyard, so I was told. I didn't run there and ask him, "Should I go." I was not losing time for nothing.

Mr. MURMAN: Q. Had Mr. Astrup ever asked you to do work around the shipyard before this particular day?

A. Dozens of times.

Q. What understanding was there?

A. There was not hardly any understanding, they paid me for it.

Q. Did they pay you?

A. Yes, sure. That was a mutual understanding, a mutual agreement. In fact, they told me if I see anything—he said, "I can't be everywhere, if you see anything wrong fix it and we will fix it up."

Q. Were you on the "Star of Shetland" and employed by Mr. Small when this understanding was in existence?

A. Yes, but he was never there. There was no use sending him telegrams, he was never to be found. One day he would be in Spokane and the next day he would be in Boston. We sent him dozens of telegrams, and we have copies of them.

(Testimony of Frank Weidemann.)

Q. While you were employed by Mr. Small on the "Star of Shetland" you also had an understanding with Mr. Astrup that you were to do odd jobs around the yard and get paid [7] for them?

A. Not exactly in those words, but I reminded him of several things that I had done and he said "Go ahead and do it." For instance, at one time a yard was hanging down it was not my affair—the yard was broke, and when I came in in the evening I said, "Mr. Astrup, that yard is broke, somebody will get hurt, if it blows somebody is liable to get hurt." He said, "My God, anything like that that you see let me know." It was not exactly in those words, perhaps. Then he said, "If you see little things like that let me know."

Q. You did do odd jobs?

A. Yes.

Q. And you were paid for them by the Alaska Packers?

A. Yes, I had several jobs there.

Q. So you thought that going aboard the "Metha Nelson" was not anything unusual?

A. No, it was a usual occurrence. I was employed a half a day there on the Greenland.

Q. And you expected to be paid?

A. Yes. We didn't have any schedule or nothing. They treated me very nice—I will say that.

Q. Did you say you expected to be paid for the job on the "Greenland"?

A. I didn't say that.

Mr. GILL: I would like the record, or a copy of the record for admission in evidence.

Mr. MURMAN: We will be glad to furnish Mr. Gill with any records we have. They are original records. Mr. Gill has attached the copy of the records to his complaint. They are already before the Court as a part of the pleading. We have no objection but we just made that suggestion.

Mr. GILL: I have a certified copy of the form for decision, a copy of the answer of the employee, a copy of the notice of controversy, the *attendion* physician's report, and various reports of that kind, but no letters that were exchanged between Mr. Pillsbury and Mr. Tichenor.

The COURT: What would they disclose if they were put in? [78]

Mr. GILL: Merely that this was a consent thing.

The COURT: I think that is not disputed, is it?

Mr. RESLEURE: There are two letters that we introduced in evidence that show that it was not a consent.

Mr. GILL: Those letters speak for themselves. We wanted the extent of the liability determined.

Mr. RESLEURE: Mr. Pillsbury thought you were consenting and asked about it, and the letter came back that they were not consenting, so he went ahead and had a hearing.

The COURT: Proceed.

Mr. RESLEURE: What disposition are we making of it?

The COURT: Can't we read them into the record?

Mr. MURMAN: Yes. We have no objection to that.

Mr. GILL: I have Mr. Pillsbury's certification of these documents as true copies. I offer in evidence the transcript of testimony of the hearing on August 28, 1931. I will supplement the certified copies with the letters.

Mr. MURMAN: No objection.

(The document is marked "Plaintiff's Exhibit 1.")

Mr. RESLEURE: Mr. Pillsbury will consent to the entire record going into evidence, subject to being withdrawn as he needs it. Perhaps we can stipulate that the letters may be copied, if necessary, and copies substituted in place of the originals.

Mr. GILL: This file may be of considerable importance to us because it has in it the various notices given by Mr. Pillsbury.

The COURT: They have stipulated that it may all go in, have they not?

Mr. RESLEURE: Yes.

The COURT: It will be received as an exhibit, Plaintiff's Exhibit No. 2.

(The document was here marked

"PLAINTIFF'S EXHIBIT 2.")

[Letterhead of Alaska Packers Association]

238-15

San Francisco
December
Twentieth,
1929

Mr. Warren H. Pillsbury,
Deputy Commissioner, U. S. Employees
Compensation Com.,
Mills Building, San Francisco.

Re: F. Weidemann

Dear Sir:

On November 13th, Captain Frank Weidemann was injured on board of the Alaska Packers Association's three-masted Schooner METHA NELSON, lying at the dolphins in Fortmann Basin, Oakland Estuary, Alameda, California. The facts in connection with this accident are these: Weidemann was employed by Arthur E. Small of 866 Tremaine Avenue, Los Angeles, as Shipkeeper on the Four-masted Bark STAR OF SHETLAND at a wage of $150.00 per month without board. Small had purchased the STAR OF SHETLAND from the Alaska Packers Association and had paid a deposit on her. The Schooner METHA NELSON was lying abreast of that vessel. Employees of the Alaska Packers Association on the METHA NELSON, under suggestion of the Alaska Packers Association's Superintendent called to Captain Weidemann aboard his vessel asking him to give them a hand

holding a tapeline to make certain measurements. Captain Weidemann, in descending into the hold of the METHA NELSON fell from the last rung of the ladder and suffered injuries as reported to you in our accident report.

If, in your estimation, the Alaska Packers Association is responsible for this accident, will you please make an award in this particular case, in order that we may properly take care of the injured. For your information will state that since the accident the Alaska Packers Association has assumed all doctor and hospital bills and paid Weidemann in full, $150.00 per month. However, we believe that under the law, there is only a certain percentage of this amount that he would be entitled to.

Yours truly,
ALASKA PACKERS ASSOCIATION,
A. K. Tichenor,
Vice-President and General Manager.

AKT/FS

12-23-29

Alaska Packers Association,
111 California St.,
San Francisco, Calif.

F. Weidemann, 238-15
Alaska Packers Asso.

Gentlemen: Atten. A. K. Tichenor, Vice President

Referring to injury to Captain F. Weidemann, from the facts stated by you the probability will

seem to be that he would be entitled to compensation from you under the Longshoremen's Act. Possibly a different conclusion might be reached upon the development of further facts. In any event, I will set the matter for investigation and hearing as you request.

I enclose blank forms for making claim for compensation, and would thank you to have them executed by Mr. Weidemann and returned to this office. I am setting the case for hearing January 7, 1929, at 3 p. m. at my office, 383 Mills Bldg., San Francisco. If Captain Weidemann is able to come in at that time, I can investigate the situation then. If not, I will arrange such continuance as may be necessary.

Kindly mail me his address.

I would suggest that you fill out and forward to me, if you have not already done so, form US-202, employer's first report of injury. You can accompany this with form US-207, Controversion Notice, if you wish the question of liability to be kept open until my decision.

Appreciating your courtesy in advising me of this matter, I remain,

Yours very truly,
WARREN H. PILLSBURY,
Deputy Commissioner
13th Compensation District.

WHP:CJ
Enc. 203

Form US-226 B

United States of America
UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Case No. 238-15
Claim No. 237

In the Matter of the Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act.

CAPT. FRANK WEIDEMANN

Claimant.

against

ALASKA PACKERS ASSOCIATION

Employer.

self-insurer

NOTICE OF HEARING

To Capt. Frank Weidemann, 2160 Buena Vista Ave., Alameda, Calif.; Alaska Packers Association, 111 Calif. St., San Francisco.

You are hereby notified that upon initiative made by Deputy Commissioner, an interested party in the above-entitled claim, a hearing on such claim is hereby ordered, to be held before Warren H. Pillsbury, Deputy Commissioner, Deputy Commissioner 13th Compensation District of the United States Employees' Compensation Commission, at Room 383 Mills Bldg., in the City of San Francisco, Cali-

fornia, Tuesday on the 7th day of January, 1930, at 3 o'clock p. m. of that day.

.....

.....

In testimony whereof, the undersigned, a Deputy Commissioner of the United States Employees' Compensation Commission, has hereunto set his hand at San Francisco, California this 27th day of December, 1929.

WARREN H. PILLSBURY
Deputy Commissioner.
13th Compensation District.

WHP:A
Reporter
Filed 12-27-29

RETURN OF SERVICE

I certify that a duplicate/original of the within Notice of Hearing was (strike out method not applicable) [duly served in person on/sent by registered mail to] the person named herein on.....

.....
(Month, Day, Year)

.....
(Name of person making service)

.....
(Official title)

Claim No. 237 Case No. 238-15

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Notice of Hearing was sent by registered mail to the following named persons at the addresses set opposite their names on the date indicated below:

Capt. Frank Weidemann, 2160 Buena Vista Ave., Alameda, Cal.

Alaska Packers Association, 111 Calif. St., S. F.

K. S. ANDERSON
Clerk,
U. S. Employees' Compensation Commission,
13th Compensation District,
San Francisco, Calif.

Mailed 12/27, 1929,

[Letterhead of Alaska Packers Association]

238-15

San Francisco,
December
Twenty-Seventh,
1929

Mr. Warren H. Pillsbury, Deputy Com'r.,
U. S. Employees' Compensation Commission,
Mills Building, San Francisco.

Re: F. WEIDEMANN

Dear Sir:

In compliance with your letter of December 23d, we are enclosing herewith Captain Weidemann's

claim for compensation, which we hope is filled out in the proper manner.

The case is a trifle unusual, owing to the fact that Weidemann was employed by A. E. Small of Los Angeles, California, who purchased the four-masted Bark STAR OF SHETLAND from us. It seems that Small is without funds and unable to pay Weidemann anything, even if Small was responsible for the injury.

Captain Weidemann is an ex-employee of our company, and we feel that we should take care of him, inasmuch as the slight service he was rendering at the time of the injury was for our company, as explained to you in our letter of December 20th. However, we would like an opinion on the subject, and the responsibility fixed by your Commission.

Captain Weidemann, I am quite sure, would not be able to attend the hearing on the 7th of January, as, in addition to his injury, we believe he is suffering from some heart ailment.

We wish to thank you for the interest you have shown in this case.

Yours very truly,
ALASKA PACKERS ASSOCIATION,
A. K. Tichenor
Vice-President and General Manager.

AKT/FS
Encl.

Form US-203

Leave this space blank

Case No. 238-15
Insurance
Carrier's No. 306

United States Employees' Compensation Commission.

Office of Deputy Commissioner.....

Administering Longshoremen's and Harbor Workers' Compensation Act

EMPLOYEE'S CLAIM FOR COMPENSATION
(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

INJURED PERSON

1. Name of employee Frank Weidemann
   Employee's Check No.....
2. Address: Street and No. Buena Vista Ave 2160 City or town Alameda
3. Sex Male Age 55
   Married, single, widowed Married
4. Do you speak English? Yes
   Nationality German
5. State regular occupation Master Mariner
6. What were you doing when injured? Going down a ladder into hold of vessel to assist taking a measure

7. (a) Wages or average earnings per day, $150.00 per month (Include overtime, board, rent, and other allowances.) (b) Per week, _____ (c) Were you employed elsewhere during week in which you were injured? Yes (d) If so, state where and when On board Bark Star of Shetland
8. Were you paid full wages for day of accident? Yes

EMPLOYER

* 9. Employer A. E. Small—But at time of injury assisting an employee of Alaska Packers Assn.
*10. Office address: Street and No. California St 111 City or town San Francisco
11. Nature of business Salmon Packing

THE INJURY

12. Place where injury occurred On Board Schr. Metha Nelson at Alameda Calif
(Give place, and name of vessel)
13. Name of foreman _____
14. Date of accident or first illness, the 15th day of Nov, 1929, at 3 o'clock P. M.
15. How did accident happen or how was occupational disease caused? Fell off ladder

NATURE AND EXTENT OF INJURY

16. State fully nature of injury or occupational disease: Broken bones, wrists and right shoulder
17. On what date did you stop work because of injury? Nov 16th, 1929.
18. Have you returned to work? (Yes or No.) No If "yes," on what date?....., 192
19. Does injury keep you from work? (Yes or No.) Yes
20. Have you done any work in period of disability? No
21. Have you received any wages since injury? Yes If so, from and to what date? Since Nov. 15 to date
22. Has injury resulted in amputation? No If so, describe same

---

*23. Did you request your employer to provide medical attendance? No Has he done so? Yes
24. Attending physician: Name Adams and Adams Address 802 Medical Bldg. Oak.
25. Hospital: Name Peralta Address Oakland 30th St.

NOTICE

*26. Have you given your employer notice of injury? (Yes or No.) Yes
When? Nov 15, 1929.

*27. If such notice was given, to whom?
Dr. Robinson

*28. Was it given orally or in writing? Orally

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by Frank Weidemann
X his mark.

Claimant.

Mail address 2160 Buena Vista Ave., Alameda.

Dated Dec. 26th, 1929

1/3/30 Copy sent to Emp.

KLA

*See back hereof.

[On back]

I was employed by A. E. Small, of #866 Tremaine Avenue, Los Angeles, Calif., as shipkeeper on Bark "Star of Shetland", at $150.00 per month.

Small owing to lack of funds has not paid me for several months.

At the time of injury I was assisting employees of the Alaska Packers Association at their request on Schooner "Metha Nelson".

I notified A. E. Small by wire of my accident but have not received any compensation or medical or surgical attention from him.

The Alaska Packers Association has paid my wages in full since Nov. 15th, 1929, and they also paid all my expenses as a result thereof.

Form US—215A

Leave This Space Blank

Case No. 238-15
Insurance
Carrier's No. 306

United States Employees' Compensation Commission
Office of Deputy Commissioner Warren H. Pillsbury
Administering Longshoremen's and Harbor Workers' Compensation Act

NOTICE TO EMPLOYER AND INSURANCE CARRIER THAT ANSWER TO CLAIM FOR COMPENSATION SHOULD BE MADE

Gentlemen:

There is inclosed copy of a claim for compensation which has been filed in this office by CAPT. FRANK WEIDEMANN. The employer or his insurance carrier should make answer within ten days from the date that a copy of it is received by him.

The original answer should be mailed to the deputy commissioner at the above address and a copy thereof served upon the claimant either personally or by mailing it to the address in the claim. Blank forms to be used in making your answer are inclosed.

Unless you deny liability, you should proceed to pay compensation immediately in accordance with the provisions of section 14 of the law, and not require the claimant, as well as yourself, to incur the expense incidental to a hearing at this office.

Very truly yours,

A. Deputy Commissioner.

Form US—207

Leave This Space Blank
Case No. 238-15
Insurance
Carrier's No. 306

United States Employees' Compensation Commission

Office of Deputy Commissioner.....
Administering Longshoremen's and Harbor Workers' Compensation Act

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NOTICE TO THE DEPUTY COMMISSIONER THAT CLAIM WILL BE CONTROVERTED

(To be submitted in duplicate to Deputy Commissioner, who will forward copy to Commission)

NOTE.—This form must be completed and filed with the Deputy Commissioner on or before the

14th day after the employer has knowledge of the alleged injury or death, in all cases where the right of the injured to compensation is controverted.

---

1. Name of employer.....
2. Office address: Street and No.....
   City or town.....
3. Name of injured person.....
4. Present address: Street and No.....
   City or town.....
5. Date of alleged accident or first illness....., 192 , ...M.
6. Nature of alleged accident or occupational disease .....
7. When was notice of injury received from employer? ....., 192
8. This case will be controverted for the following reasons:
   (a) For Weekly wage?.....
   (b) For rate of compensation?.....
   (c) For period of disability?.....
   (d) If controverted for any other reason, state fully below:

   .....

   .....

   and reserves the right to controvert for such other reasons as may later appear.

9. Do you believe the controversy can be settled by conference without the necessity for sworn testimony? .....

(Yes or no)

Name of Insurance Carrier.....

Signed by .....

Official title .....

Dated....., 192....

[Written across face is the following]:

U. S. Employees' Compensation Commission

We desire to pay this man until decision and award is made.

Alaska Packers Association
Per A. K. Tichenor
V. P. and G. M.

[Letterhead of Alaska Packers Association]

238-15

San Francisco,
December
Thirtieth
1929

Mr. Warren H. Pillsbury, Deputy Commissioner,
U. S. Employees' Compensation Commission,
Mills Building, San Francisco.

Re: Captain Frank Weidemann

Dear Sir:

Regarding the notice of hearing, Captain Frank Weidemann vs. Alaska Packers Association, to be

held at Room 383 Mills Building on January 7th, 1930.

We have just ascertained from Drs. Adams and Adams, attending Captain Weidemann, that while the Captain will be released from the Hospital next week, they do not think he will be able to make a trip to San Francisco or attend the hearing before three or four weeks thereafter. Captain Weidemann has requested us to apply for a postponement of the hearing.

Yours truly,

ALASKA PACKERS ASSOCIATION,
A. K. Tichenor,

AKT/FS Vice-President and General Manager.

Form US—215

Leave This Space Blank
Case No. .....
Insurance
Carrier's No. .....

United States Employees' Compensation Commission

Office of Deputy Commissioner.....
Administering Longshoremen's and Harbor Workers' Compensation Act

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ANSWER OF EMPLOYER OR INSURANCE CARRIER TO EMPLOYEE'S CLAIM FOR COMPENSATION

Frank Weidemann, Claimant

vs.

Alaska Packers Ass'n, Employer

No , Insurance Carrier.

The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is *admitted that applicant sustained an injury on or about the date set forth in the application.

2. It is admitted that both the employer and employee were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury.

3. It is admitted that the relationship of employer and employee existed at the time of the injury.

4. It is admitted that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is admitted that notice of injury was given employer as specified in application.

6. It is admitted that applicant was permanently disabled to the extent stated in application.

7. It is admitted that applicant was temporarily disabled for the period stated in application.

*[Printer's Note: In each paragraph where the word "admitted" appears the word "denied" has been stricken out and has been omitted.]

8. It is admitted that the rate of wages as set forth in application is correct.

9. _____

Please see our letter to Mr. Warren H. Pillsbury dated December 27, 1929, regarding circumstances in connection with above injury.

ALASKA PACKERS ASSOCIATION,
Signed A. K. Tichenor
V. P. and Gen. Mgr.

Note.—The employer or insurance carrier should answer the claim within ten days from the date that a copy of it is served upon him. The original answer should be mailed to the deputy commissioner at the above address and a copy thereof served upon the claimant either personally or by mailing to the address in the claim.

1-8-30

Alaska Packers Association,
111 California St.,
San Francisco, Calif.

Capt. Frank Weidemann, 238-15
Alaska Packers Association
11-15-29

Atten. A. K. Tichenor, V. P. & Gen. Mgr.

Gentlemen:

Referring again to the Weidemann case, nothing was done at the hearing set for January 7, as

neither side appeared by previous oral arrangement. I marked the matter continued until further notice.

In the meantime I have received your answer which admits all of the allegations of the claim. My previous understanding of the case was that while you were disposed to accept my informal opinion based upon your statement of the facts, you still desired to present the facts more formally and secure an official ruling. I had, therefore, not regarded the question as wholly closed, so that I would be free to form a further judgment if fuller facts presented at the hearing should change the situation.

If, as indicated by your answer on file, it is now your intention to admit jurisdiction without reservation I could make another decision at once without a hearing under the authority of Sec. 19-c of the Longshoremen's Act. If, however, your admissions in your answer were not intended to go that far and you still desire to present the facts more fully for my further consideration, I will set the matter for further hearing.

Please let me know what your position is in the matter.

Yours very truly,
WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

WHP:CJ

[Letterhead of Alaska Packers Association]

238-15

San Francisco,
January
Fourteenth,
1930

Mr. Warren H. Pillsbury,
Deputy Commissioner,
U. S. Employees' Compensation Commission,
Mills Bldg., San Francisco.

Re: Frank Weidemann

Dear Mr. Pillsbury:

Replying to your letter of January 8th, 1930, regarding Captain Frank Weidemann case:

We beg to inform you that our admissions and our answers were not intended to convey the idea that we did not desire to present the facts for further consideration. As a matter of fact, we would like to have you pass on the responsibility of this particular case.

We believe that Captain Weidemann now will shortly be able to attend a hearing, as we understand he is able to walk about some. We are paying the Captain full compensation and intend to continue doing so for a reasonable time, but, as stated before, we would like to have the responsibility fixed.

Yours truly,
ALASKA PACKERS ASSOCIATION,
A. K. Tichenor,
Vice-President and General Mgr.

AKT/FS

United States Employees' Compensation Commission

13th Compensation District

Case No. 238-15 Claim No. 237

In the Matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

CAPTAIN FRANK WEIDEMANN,

Claimant.

against

ALASKA PACKERS ASSOCIATION,

Employer.

Self

Insurance Carrier.

Please take notice that a further hearing has been set in this matter at the request of defendant for Monday, January 27, 1930 at 11:30 a. m. at Room 383 Mills Bldg., San Francisco, California for the purpose of taking testimony on the merits of case.

Given under my hand at San Francisco, Calif., this 17th day of January, 1930.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

WHP:A

Filed 1-17-30

Reservation

Reporter

Calendar

238-15

U. S. Employees' Compensation Commission
Washington
Weidemann

Set for hearing for 1-27-30.

Req. of def.

Purpose: taking of testimony on the merits of the case.

Claim No. 237 Case No. 238-15

PROOF OF SERVICE

I hereby certify that a copy of the foregoing notice of hearing for purpose of taking testimony on merits of case was sent by regular mail to the following named persons at the addresses set opposite their names on the date indicated below:

Capt. Frank Weidemann, 2160 Buena Vista Ave., Alameda, Calif.

Alaska Packers Assn., 111 California St., S. F.

K.S.A.
Clerk,
U. S. Employees' Compensation Commission,
13th Compensation District,
San Francisco, Calif.

Mailed 1-17-30, 1929.

United States Employees' Compensation Commission

13th Compensation District

Case No. 238-15 Claim No. 237

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

CAPT. FRANK WEIDEMANN,

Claimant,

against

ALASKA PACKERS ASSOCIATION,

Employer.

Self-insurer

COMPENSATION ORDER
AWARD OF COMPENSATION

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT.

That on the 15th day of November, 1929, the claimant above named was in the employ of the employer above named at Alameda in the State of California in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by licensed self-insurance;

That the facts concerning said employment are specially found as follows: Claimant had been regu-

larly employed by defendant, Alaska Packers Association, for a number of years, this former employment terminating one or two years before the injury hereinafter found. Some six or 7 months prior to the injury defendant sold its vessel "Star of Shetland" to one Arthur E. Small; the latter employed claimant to act as shipkeeper on said vessel thereafter and claimant was so employed on the day of injury. The vessel continued to lie at the shipyard of defendant throughout all said time. From time to time after the sale claimant was requested by the superintendent of defendant's yard to render occasional services for short periods of time to defendant about said yard and in connection with defendant's vessels lying there. For this service claimant was compensated by occasional lump payments without strict record being kept of the time involved. On the afternoon of November 15, 1929, he was requested through defendant's superintendent to render service for defendant for a short time on its ship "The Star of Greenland" and thereafter to assist a surveyor in making certain measurements on defendant's vessel "The Metha Nelson", both of said vessels then lying at defendant's yard. He was injured while performing such service on the latter vessel. No specific agreement was made for compensation of said service on said day. It was claimant's expectation that he would be paid for such service at some future time and the expectation of defendant's superintendent that payment therefor would be included in any payment made for subsequent services if such later service should be rendered. It is, therefore, determined that such

services were rendered under an implied contract of hire;

That on said day claimant sustained injury upon said vessel "Metha Nelson" then afloat upon the navigable waters of the United States, said injury occurring in the course of and arising out of his employment and resulting in disability as follows: While going down into the hold of said vessel to perform service therein he fell from the ladder sustaining serious injuries;

That notice of injury was not given within thirty days, but that the employer had knowledge of the injury and that the employer or carrier has not been prejudiced by failure to give notice;

That the employer furnished claimant with medical treatment, etc., in accordance with section 7(a) of the said Act;

That the average annual earnings of the claimant herein at the time of his injury amounted to the sum of $1950;

That as the result of the injury sustained the claimant was wholly disabled from November 15, 1929, indefinitely and is entitled to temporary total disability compensation at the rate of $25 a week until the termination of such disability;

That the compensation accrued to the date of the hearing, January 27, 1930, 10-4/7 weeks, $25 per week, amounts to $264.28;

That the employer is entitled to credit upon compensation payments due for all payments made to claimant since his injury on acount of loss of time;

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD.

That the employer, Alaska Packers Association, shall pay to the claimant compensation as follows:

The sum of $264.28 to and including January 27, 1930, less all payments heretofore made on said account and the further sum of $25 a week thereafter until the further order of the Deputy Commissioner.

Given under my hand at San Francisco, Calinia, this 1 day of February, 1930.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

Filed 2-1-30
WHP:CJ

Claim No. 237 Case No. 238-15

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order Award was sent by registered mail to the following named persons at the addresses set opposite their names on the date indicated below:

Captain Frank Weidemann, 2160 Buena Vista Ave., Alameda, Calif.
Alaska Packers Assn., 111 Calif. St., S. F.
US ECC Washington (regular)

K.S.A.
Clerk,
U. S. Employees' Compensation Commission,
13th Compensation District,
San Francisco, Calif.

Mailed 2/3/30,

Form US—216

Leave This Space Blank

Case No. 238-15
Insurance
Carrier's No. 723

United States Employees' Compensation Commission

Office of Deputy Commissioner Warren H. Pillsbury
Administering Longshoremen's and Harbor Workers' Compensation Act

REQUEST FOR ADDITIONAL REPORTS

October 18, 1930

Alaska Packers Association,
111 California St.,
San Francisco, Calif.

Dear Sir:

Will you kindly refer to the case of Captain Frank Weidemann, injured on November 15, 1929, while in the employ of your company and furnish the present status of this case.

If complete or adequate information can not be given on the specified printed blanks, kindly report by letter, sending this office the original and one copy. Your cooperation is solicited.

Very truly yours,

Deputy Commissioner.

THE LAW PROVIDES RELATIVE TO REPORTS

1. The employer is required to report an injury within ten days following his knowledge of its occurrence or onset.

2. A physician is required to furnish report within twenty days following first treatment.

3. Notice of starting payment or stopping payment of compensation must be furnished to Deputy Commissioner at once.

4. Notice of a controversion of claim must be furnished within fourteen days after an employer has knowledge of an injury or death.

5. Notice of final payment of compensation must be furnished within sixteen days following such payment.

6. An injured employee who elects to sue a third party rather than take compensation must file notice of such election with the Deputy Commissioner.

7. The Deputy Commissioner has power to require any report at any time.

[Letterhead of Alaska Packers Association]

San Francisco
111 California Street

October
Twentieth,
1930

Mr. Warren H. Pillsbury,
U. S. Employees' Compensation Commission,
Mills Building, San Francisco.

Dear Sir:

Referring to Case No. 238-15, Insurance Carrier's No. 723, in re Captain Frank H. Weidemann:

Beg to inform you that Weidemann has recovered to a large extent, but we are still paying him the $150.00 per month award. However, Captain Weidemann is acting as Night Watchman at our Shipyard in Alameda, doing work that we would otherwise have to pay $100 per month for.

On Captain Weidemann's next visit to the Doctor, we will ask the Doctor to make a complete report to the Commission on the condition of Captain Weidemann's hand.

Yours truly,
ALASKA PACKERS ASSOCIATION,
A. K. Tichenor,
Vice-President and General Manager.

AKT/FS

[Letterhead of Alaska Packers Association]

San Francisco
111 California Street

October
Twenty-Fourth,
1930

Mr. Warren H. Pillsbury,
U. S. Employees' Compensation Commission,
Mills Building, San Francisco.

Dear Sir:

In accordance with our letter of October 20th regarding Captain Frank Weidemann (Case No. 238-15, Insurance Carrier's No. 723):

We are enclosing herewith the doctor's report in this case, dated October 23d, 1930.

You will notice that there is a vast improvement.

Yours very truly,

ALASKA PACKERS ASSOCIATION,
A. K. Tichenor,
Vice-President and General Manager.

AKT/FS
Encl.

238-15

W. C. Adams, M. D.
Res. Phone Glencourt 3622
J. H. Adams, M. D.
Res. Phone Glencourt 1427
DRS. ADAMS & ADAMS
Physicians & Surgeons
Physiotherapy
Oakland 0890 Oakland 3882
802-3-4 Medical Building
Oakland, California

Oct. 23, 1930

Alaska Packers Association
111 California Street
San Francisco, Calif.

Attention: Mr. A. K. Tichenor
Re: Captain Frank Weidemann

Gentlemen:

The above named injured appeared at this office on Oct. 22, 1930 for examination. The measurements of the joints of the right hand as compared with those of the left are as follows:

	Metacarpo-Phalangeal Joint	Proximal Inter-Phalangeal Joint	Distal Inter-Phalangeal Joint
Thumb	40/37	37/40	
Index Finger	67/63	75/83	42/58
Middle Finger	72/63	77/90	38/55
Ring Finger	75/73	68/90	35/42
Little Finger	68/80	67/85	37/42

We are not yet able to test his grip with the gripping machine. The finger tips now lack but a

finger breadth of approximating the palm. The tip of the thumb can now approximate the tips of the index, middle and ring fingers.

From the above it can be seen that definite improvement has been made since August and the injured states that he is able to do better than what he did at this examination. The right wrist joint is much improved over what it was before the injury in question. We have advised him to return on Dec. 1, 1930 for another checkup.

I do not believe that a permanent disability rating should be considered.

Very truly yours,
DRS. ADAMS & ADAMS,
By W. C. Adams, M. D.

WCA:RP

January 15, 1931

Alaska Packers Association,
111 California St., Frank Weidemann, 238-15
San Francisco, Calif. Inj. 11-15-29

Gentlemen:

Your letter of October 23, 1930, concerning the above named employee, stated that he was to return about Dec. 1, 1930, for a checkup examination as to maximum improvement and degree of permanent disability, if any. Will you kindly advise this office as to the present status of the matter and as to whether the case appears one ready for permanent disability rating. A copy of

the last medical report will be appreciated.

Yours very truly,

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.
By HUGH A. VORIS,
Examiner.

HAV:CJ

[Letterhead of Alaska Packers Association]

San Francisco,
111 California Street
January
Sixteenth,
1931

Mr. Warren H. Pillsbury,
Deputy Commissioner,
13th Compensation District,
Mills Bldg., San Francisco.

Re: Captain Frank Weidemann, 238-15
Inj. 11-15-29

Dear Sir:

Replying to your letter January 15th, 1931 regarding Captain Frank Weidemann: For your information, we are attaching hereto copy of Dr. Adams' letter bearing on this case. If you desire any further information, please advise us and we will submit it.

In speaking of permanent disability rating, etc. we hope you will appreciate the fact that this man has been kept on our pay rolls at full pay since

the date of the accident, and that at no time did we question our ability in this case.

Yours very truly,
ALASKA PACKERS ASSOCIATION,
A. K. Tichenor,
Vice-President and Gen Mgr.

AKT-FS
Encl.

Copy

January 6, 1931

Alaska Packers Assoc.
Foot of Paru Street,
Alameda, California.

Gentlemen:

Re: Capt'n. Frank Weidemann

I wish to report in the case of the above named individual that on his visit to this office on this date there was little difference in the measurements of the joints of the right hand as compared with those of October 2 and December 1, 1930.

The injured states that he feels that his joints have been better than they were today, that the cold weather seemed to affect them. While he is not able to register on the gripping apparatus, it is noted that there is very marked increase in strength of all the fingers, and the injured states that he can now put strong pressure on the hand without pain. The motions of this right wrist are excellent.

He is now in such shape that were he called upon to command a ship, I feel certain he could do so very ably. I feel quite certain that this man's hand in time, if given sufficient time, will return practically to the normal.

He is to return in the first week in February for a check-up.

Very sincerely yours,
DRS. ADAMS & ADAMS,
By W. C. Adams, M. D.

WCA:CM
CC to S. F. Office

Form US—216

Leave This Space Blank

Case No. 238-15
Insurance
Carrier's No. 723

United States Employees' Compensation Commission
Office of Deputy Commissioner Warren H. Pillsbury
Administering Longshoremen's and Harbor Workers' Compensation Act

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REQUEST FOR ADDITIONAL REPORTS

July 28, 1931

Alaska Packers Association,
111 California St.,
San Francisco, Calif.

Dear Sir:

Will you kindly refer to the case of Capt. Frank Weidemann injured on Nov. 15, 1929, while in the

employ of yourself and furnish the following reports:

Complete information as to the present status of this case.

If complete or adequate information can not be given on the specified printed blanks, kindly report by letter, sending this office the original and one copy. Your cooperation is solicited.

Very truly yours,

WARREN H. PILLSBURY,
Deputy Commissioner.
383 Mills Bldg., S. F.

P

THE LAW PROVIDES RELATIVE TO REPORTS

1. The employer is required to report an injury within ten days following his knowledge of its occurrence or onset.

2. A physician is required to furnish report within twenty days following first treatment.

3. Notice of starting payment or stopping payment of compensation must be furnished to Deputy Commissioner at once.

4. Notice of a controversion of claim must be furnished within fourteen days after an employer has knowledge of an injury or death.

5. Notice of final payment of compensation must be furnished within sixteen days following such payment.

6. An injured employee who elects to sue a third party rather than take compensation must file no-

tice of such election with the Deputy Commissioner.

7. The Deputy Commissioner has power to require any report at any time.

[Letterhead of Alaska Packers Association]

San Francisco,
111 California Street
Address all communications to the Association
and not to individuals.

July
Twenty-ninth,
1931

U. S. Employees' Compensation Commission,
383 Mills Building,
San Francisco.

Gentlemen:

Referring to your report, case No. 238-15, Insurance Carrier's No. 723, Captain Frank Weidemann, injured November 15th, 1929, on board the Schooner Metha Nelson while lying in the Shipyard of the Alaska Packers Association:

Wish to inform you that Captain Weidemann is in the employ of the Alaska Packers Association as Chief Night Watchman at Alameda. He is in apparently good health and has entirely recovered from the injury. Captain Weidemann is now on vacation in Southern California. We believe that the Alaska Packers Association should be discharged from any further responsibility or payments as far as the United States Employees' Compensation Commission is concerned.

It is our intention to retain Captain Weidemann in our employ, and as a matter of fact had quite forgotten the incident of his injury.

Yours truly,
ALASKA PACKERS ASSOCIATION,
A. K. Tichenor,
AKT/FS Vice-President and General Manager.

Aug. 4, 1931
Capt. F. Weidemann, 238-15
Alaska Packers Assn.
11-15-29

Alaska Packers Assn.,
111 California St.,
San Francisco, California.

Attention of A. K. Tichenor:

Dear Sir:

This is to acknowledge your letter of July 29th advising that Capt. Weidemann's disability terminated sometime ago.

Kindly forward to this office in duplicate form U S 208 which is the closing report to be filed whenever disability terminates. We are enclosing a few forms for this purpose.

Upon receipt of this form, proceedings will be commenced to terminate your liability under the award of February 1, 1930.

Yours very truly,
WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District

WHP:A
Encl Forms 208

[Letterhead of Alaska Packers Association]

San Francisco
111 California Street

August
Twelfth,
1931

United States Employees' Compensation
Commission,
Mills Building,
San Francisco.

Attn. Mr. Warren H. Pillsbury

Re: CAPT. F. WEIDEMANN,—238-15

Gentlemen:

Enclosed find report on form U. S. #208, in duplicate, covering the above case, attached to which you will find schedule of payments to Captain Weidemann from November 15th, 1929, to and including November 15th, 1930, showing payments made on account of compensation, and also wages earned during this period.

We would be pleased to have our liability under this award terminated.

Yours truly,
ALASKA PACKERS ASSOCIATION,
A. K. Tichenor,
Vice-President and General Manager.

BPT/FS
Encl.

Form US—208

Leave This Space Blank

Case No. .....
Insurance
Carrier's No. .....

United States Employees' Compensation
Commission
Office of Deputy Commissioner
San Francisco, Calif.
Administering Longshoremen's and Harbor
Workers' Compensation Act

NOTICE TO THE DEPUTY COMMISSIONER THAT THE PAYMENT OF COMPENSATION HAS BEEN STOPPED OR SUSPENDED.

(To be filed with Deputy Commissioner, in duplicate, immediately upon stoppage or suspension of compensation)

1. Name of employer Alaska Packers Association.
2. Office address: Street and No. 111 California St. City or Town San Francisco, Cal.
3. Name of injured person Frank Weidemann
4. Present address: Street and No. 2160 Buena Vista Av. City or town Alameda, Cal.
5. Date of accident or first illness Nov. 15, 1929 Date disability began Nov. 15, 1929
6. Date compensation began Nov. 15, 1929 Date disability ended Nov. 15, 1930

7. Date compensation ended Nov. 15, 1930 Days worked during disability 215
8. Period of actual disability 52 weeks 2 days.
9. Average daily wage $_____ multiplied by _____ = $_____ divided by 52 = average weekly wage $_____ multiplied by 2/3 = compensation rate, $_____

(Maximum compensation limit $25 per week)

10. If temporary partial disability, give computation of compensation paid_____

Basis of Compensation Payments, Excluding Medical

Nonfatal	Amount
Temporary total 13 wks 2 days	$450.00
" partial 39 " " "	495.60
Permanent total " " "	
" partial " " "	
Disfigurement	
Partial payments as per statement attached	
Total	945.60

Fatal	Amount
Paid to dependents	
Name	
"	
"	
"	
"	
"	

Funeral expense .....

No dependents—paid to the Treasurer of the United States .....

Total .....

11. Description of permanent injury or facial or head disfigurement .....

12. Has compensation been paid in full? Yes If not, give reasons why payments have been stopped or suspended.....

Name of Insurance Carrier Self-insured

Signed by.....

Official title Vice-Pres. and General Mgr.

Dated August 12, 1931.

SCHEDULE OF PAYMENTS TO F. WEIDEMANN, 238-15.

				Wages	Compensation
Nov. 15, 1929 to Feb.	15th, 1930,	3	mo.@$150		$450.00
Feb. 16, 1930 to Feb.	28th, 1930,	2	days	$9.60	65.40
Mar. 1, 1930 to Mar.	31st, 1930,	8	"	36.00	114.00
Apr. 1, 1930 to Apr.	30, 1930,	6	"	28.80	121.20
May 1, 1930 to May	31, 1930,	31	"	120.00	30.00
June 1, 1930 to June	30, 1930,	30	"	120.00	30.00
July 1, 1930 to July	31, 1930,	31	"	120.00	30.00
Aug. 1, 1930 to Aug.	31, 1930,	31	"	120.00	30.00
Sept. 1, 1930 to Sept.	30, 1930,	30	"	120.00	30.00
Oct. 1, 1930 to Oct.	31, 1930,	31	"	120.00	30.00
Nov. 1, 1930 to Nov.	15, 1930,	15	"	60.00	15.00
		215	days	$854.40	$945.60

Form U S-212

Leave this Space Blank
Case No. 238-15
Insurance
Carrier's No. 723.

United States Employees' Compensation Commission

Office of Deputy Commissioner_____

Administering Longshoremen's and Harbor Workers' Compensation Act

NOTICE TO INJURED EMPLOYEE THAT CASE WILL BE CLOSED UNLESS PAYMENTS MADE ARE SHOWN TO BE INCORRECT.

Aug. 14, 1931.

Mr. Capt. Frank Weidemann,
2160 Buena Vista Ave.,
Alameda, Calif.

Dear Sir:

Various reports which have been filed here by the employer, the insurance carrier, and attending physicians show the following relative to your case:

___Injured 11-15-29, and disability began 11-15-29.

___You were able to return to work within seven days and no compensation is due.

___You were paid for temporary total disability from 11-15-29 to 11-15-30 at $_____a week.

___You were paid for permanent partial disability from_____19___ to _____ at $_____ a week.

____You were paid for____per cent loss of _____
at_____at $_____ a week.

____You returned to work on_____, 19____,
at full earning power.

_x_You have no serious head or facial disfigurement, and no permanent disability from the injury for which you have not been paid compensation as shown above.

Total compensation paid (52 weeks 2 days) $945.60.

If the facts in your case are as indicated above, you have received the amount of compensation payment to which you are entitled under the law and the case will be closed in the files of this office.

If the facts are not as indicated above, kindly advise this office by personal call or letter WITHIN TEN DAYS as to the actual facts, and your case will have further investigation.

Very truly yours,

_____,

Deputy Commissioner.

238-15

Oakland, Calif.
August 18, 1931

Warren H. Pillsbury,
Deputy Commissioner,
United States Employees' Compensation Comm.
Mills Building,
220 Montgomery St.
San Francisco, Calif.

Dear Sir:

In answer to your letter of August 14th, will state that my right hand does not yet completely close as it did before my injury.

Yours very truly,

W:JC FRANK WEIDEMANN

United States Employees' Compensation Commission

13th Compensation District

Case No. 238-15 Claim No. 237

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Capt. Frank Weidemann,

Claimant

against

Alaska Packers Assn.

Employer.

Please be advised that a further hearing has been set in this matter at the request of defendants for

Friday, August 28, 1931 at 11:30 a. m. at Room 383 Mills Bldg., San Francisco, Calif.

Purpose: To ascertain extent of permanent disability, if any, and for termination of award.

Given under my hand at San Francisco, Calif. this 21st day of August, 1931.

WARREN H. PILLSBURY,
Deputy Commissioner
13th Compensation District

WHP:A
Reporter
Calendar
Reservation
Filed 8-21-31 G

Claim No. 237 Case No. 238-15

PROOF OF SERVICE

I hereby certify that a copy of the foregoing notice further hearing has been sent by regular mail to the following named persons at their last known address:

Claimant: Capt. Frank Weidemann, 2160 Buena Vista Ave., Alameda, Calif.

Employer: Alaska Packers Assn. 111 Calif. St. S. F.

Insurance Carrier:

K.S.A.
Clerk

Date 8/21/31

United States Employees' Compensation Commission

13th Compensation District

Case No. 238-15 Claim No. 237

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Capt. Frank Weidemann,

Claimant,

against

Alaska Packers Association,

Employer.

Self Insurer.

ORDER FIXING COMPENSATION FOR PERMANENT DISABILITY.

Compensation order having been issued in this proceeding on February 1, 1930, allowing claimant compensation for temporary total disability until the termination thereof or further order, and this matter having been called up for further proceeding to determine whether temporary disability has terminated and whether permanent disability has been sustained, and hearing having been had thereon, and medical and other evidence received, and the matter submitted for decision, the deputy commissioner now makes the following findings of fact and order relative thereto:

FINDINGS OF FACT.

(1) That claimant's temporary total disability terminated February 15, 1930;

(2) That the employer paid claimant his full wages of $150.00 a month during said period (13 weeks) and is entitled to credit upon the compensation herein awarded at the rate of $25 a week for 13 weeks amounting to $325.

(3) That from February 15, 1930 to November 15, 1930, claimant was temporarily partially disabled from labor. That compensation was due therefor in the sum of $495.60 which has been paid;

(4) That the condition of claimant's injured right arm reached a permanent stage about November 15, 1930.

(5) That by reason of claimant's injury of November 15, 1929, he has sustained permanent disability consisting in impairment of function of all fingers of the right hand and the loss of the major portion of the gripping power of said hand. That said condition constitutes a permanent partial disability equivalent to 44% of such disability as he would have sustained if he had lost his hand. That the compensation to which he is entitled for temporary total and permanent partial disability is $25 a week for 114.64 weeks beginning with November 15, 1930;

(6) That the unpaid compensation accrued at the date of the last hearing, August 28, 1931, is $1025.

Upon the foregoing facts the Deputy Commissioner makes the following:

ORDER.

That the employer, the Alaska Packers Association, self insurers, shall pay to the claimant compensation as follows:

In addition to all compensation heretofore paid to claimant the sum of $1025.00 to and including August 28, 1931, and the further sum of $25 a week thereafter for 60.64 weeks, payable each 2-weeks.

Jurisdiction is reserved to determine after the expiration of the payments herein awarded whether claimant will sustain any permanent disability referable to his right wrist.

Given under my hand at San Francisco, California, this 16th day of September, 1931.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th District.

Filed 9-16-31 P
WHP:CJ

PROOF OF SERVICE

Claim No. 237 Case No. 238-15

I hereby certify that a copy of the foregoing Order fixing compensation for P. D. has been sent by registered mail to the following named persons at their last known address:

Employee: Capt. Frank Weidemann, 2160 Buena Vista Ave., Alameda, Calif.

Employer: Alaska Packers Association, 111 California St., San Francisco, Calif.

USECC—reg
Insurance Carrier:

C. JEFFERSON,
Clerk

Date Sent 16/31

OFFICIAL RECORD

Name	Address
Applicants	Captain Frank Weidemann, 2160 Buena Vista Ave., Alameda, Calif.
Attny. for Applicants	Resleure & Vivelle, Balfour Bldg., San Francisco, Calif.
Defendants	Alaska Packers Association, 111 Calif. St., S. F.
Attny. for Defendants	Mr. Gill, 225 Bush St., S. F.
Insurance Company self-insurer.	
Attny. for Ins. Co.	
Lien Claimant	

[Endorsed]: Plaintiff's Exhibit No. 2. Filed Jan. 5, 1934. Walter B. Maling, Clerk.

[Endorsed]: Filed Jun. 22, 1935. Paul P. O'Brien, Clerk.

Mr. GILL: That is all.

Mr. RESLEURE: At this time we would like to make a motion [79] for a nonsuit. As the issues were defined this morning, the case involved here is as to whether or not there was extrinsic fraud practiced by Captain Weidemann which induced the Alaska Packers to consent to a decree. The evidence disclosed so far but one conversation wherein Mr. Weidemann may have said anything at all about this case to any member of the Alaska Packers Association, and that was a statement to Mr. Tichenor while Captain Weidemann was in

the hospital sick, to the effect that he was employed. As Captain Weidemann testified, he thought he was employed at that time, because he had come down here to assist on the ship. As your Honor brought out from Mr. Tichenor, he did not rely on Captain Weidemann's statement, he was thoroughly convinced, or, rather, convinced by Mr. Astrup's statement to him that Captain Weidemann was an employee at the time, and was working for the Alaska Packers Company. He was already convinced that Captain Weidemann was working for the company. Mr. Astrup, himself, testified that he did not talk to Weidemann about that matter, at all, he just got the impression that Weidemann was working because he happened to be on the ship. That is the plaintiff's entire case. There is no evidence on fraud. No evidence of any reliance on any misrepresentation. No evidence of any intentional misrepresentation. It seems to me that the Plaintiff's case must fall on the showing made so far.

Mr. GILL: I think Mr. Resleure is now addressing himself to the case which is being tried by your Honor, the first case.

The COURT: Yes, that is case No. 3056.

Mr. GILL: When this case is submitted we will submit the admiralty case on the same record.

The COURT: Yes.

Mr. GILL: In regard to the case in equity, which is one in fraud to set aside Mr. Pillsbury's award, the only thing I can say about it is precisely what Mr. Tichenor said, that he [80] had a

high regard—at least he relied on Captain Weidemann's story to him on at least three occasions, twice when he visited him in the hospital and once when he came to the office and Mr. Tichenor, himself, instructed the man to make out the captain's application to be adjusted before Mr. Pillsbury. It is quite clear he relied on this man's statement that he actually had been employed.

The COURT: The interesting thing is, where does the element of fraud come in? To be very candid with you, the witnesses have testified, and if you take the testimony given here—the testimony on one side is that they never employed him, positively. The whole matter was apparently an error. Every witness testified that way, that he was not employed. On the other hand, Weidemann does not say positively that he was employed; he says that under the circumstances he believed that he was employed. He sets forth in that connection that he had spoken to Captain Astrup and Captain Astrup spoke of future employment in connection with this work. He tells about Klotz saying they were looking for him. Nothing has been established so far as the evidence goes to show that Klotz had any authority. Without deciding this case it appears that at best there was a mutual mistake as to employment, and any testimony given by Weidemann was under the conscientious belief that he had been employed, and, therefore, it would not be fraud.

Mr. GILL: I believe that follows, your Honor, except for the contents of these letters. These let-

ters are part of the record of the case. The letters show that Mr. Tichenor represented, primarily and originally, to Mr. Pillsbury that Weidemann at the time of his injury was holding a tapeline, that he had actually assisted in making the measurements. That is part of the record. Now, is Captain Weidemann bound by that record that he, himself, induced us to believe that that was the fact? [81]

Mr. RESLEURE: There is no testimony here, however, by Captain Tichenor that Mr. Weidemann said he was holding the tapeline.

Mr. MURMAN: If plaintiff is resting his whole case on a tapeline it is rather an insecure foundation. He must establish facts showing that Weidemann succeeded in withholding evidence from Mr. Pillsbury, before whom the witnesses were sworn to testify apparently truthfully. I don't believe there is one bit of evidence presented to your Honor to the effect that Weidemann in any way or through any agent, or any confederate, or any accuser withheld any evidence from Mr. Pillsbury.

The COURT: I would like to know if Mr. Tichenor did testify that he was told by Captain Weidemann that Captain Weidemann said he was holding a tapeline on the occasion of his injury. I did not understand that Mr. Tichenor testified to that. Did you, Mr. Tichenor? Will you come forward and take the stand, and I will ask you about that.

AUSTIN K. TICHENOR,

Recalled.

The COURT: Q. At the time that you visited Mr. Weidemann at the hospital, did he tell you that, or did you get that information from Captain Astrup?

A. Tell me that he had worked in the "Metha Nelson"?

Q. No, did he tell you that he actually had a tapeline and worked with it?

A. The tapeline, I don't know how that got into evidence, the captain told me that he had been working taking measurements.

Q. He said that he had actually measured?

A. That he had been working with the man measuring the "Metha Nelson." He said that on a couple of occasions when he called at the office. He told me that.

Q. That at the time he was injured, that prior to that he had been taking measurements on that boat? [82]

A. He told me he had been working all that morning taking measurements.

Mr. MURMAN: Q. Was that statement made to you before or after you talked with Mr. Astrup about this accident?

A. Of course, I talked to Mr. Astrup first about the accident. He is the man that reported the accident to me.

(Testimony of Austin K. Tichenor.)

Q. What was the substance of his report?

A. That Captain Weidemann had been injured aboard the "Metha Nelson." I asked him how Captain Weidemann came to be on board the "Metha Nelson," and he said, "I sent him there to help those boys take the cubic measurements of the vessel."

Q. And it was subsequent to that statement by Mr. Astrup that you called on Captain Weidemann in the hospital?

A. I talked to him in the hospital, and also in our office, and I sent him to Mr. Pillsbury's office.

Q. Did he say that he had taken measurements, or did you ask him if he had taken measurements and he said "Yes"?

A. He told me he helped those boys out on board the ship.

Q. Did he say he had been taking measurements?

A. I cannot say that he said that. He said he helped them measuring the ship. The word "measurement"—I would not want to say whether we got from Astrup or from Weidemann, but the fact remains that he told me he was there helping these boys measuring the "Metha Nelson."

Q. That is to the best of your recollection?

A. Yes, I recollect that distinctly.

Q. Prior to that Captain Astrup had told you about taking measurements?

A. Yes.

(Testimony of Austin K. Tichenor.)

Mr. GILL: Here is a letter December 20, 1929, in which *which* you say to Mr. Pillsbury about Captain Weidemann having been injured in holding the line, etc. I will ask you whether or not that was dictated to your stenographer in the Alaska Packers office in the presence of Captain Weidemann.

Mr. RESLEURE: I suggest the question is leading, your Honor. [83]

The COURT: I will allow the question.

A. I can't remember whether this was dictated in his presence or not; I don't know.

Mr. GILL: Q. Do you know whether or not you wrote that letter after you saw Captain Weidemann?

A. Oh, yes, that was written after I had seen Captain Weidemann.

Q. Did the contents of that letter which you wrote to Mr. Pillsbury, is any of it accountable to the fact that you had a conversation with Captain Weidemann?

A. Yes, as a result of my conversation with Weidemann; otherwise I would not have sent the man to an emergency hospital.

The COURT: Q. Is any of that the result of your conversation with Captain Astrup?

A. Yes; Captain Astrup is the first man that spoke to me about it.

Q. You are not in a position to really say that Captain Weidemann for the purpose of perfecting

(Testimony of Austin K. Tichenor.)

his claim, we will say, or whatever reason there was back of it, said to you that he actually made measurements? All that you remember now is that Captain Weidemann said he went on board this boat to assist them?

A. To help the boys. The word "measurement," I would not say whether he used it, or not.

Mr. MURMAN: There has been no evidence produced here to prove extrinsic fraud. Mr. Califro expressly testified that no one had approached him or in any way tried to have him report to Mr. Pillsbury in order to make the record before Mr. Pillsbury complete. In other words, he left the employ of the Alaska Packers soon after the accident. He was in the vicinity here. The Alaska Packers did not make any effort to get in touch with him. He did not see Captain Weidemann at all. Captain Astrup testified that Captain Weidemann had never approached him. He testified that he was an employee of the [84] Alaska Packers Association when he testified. Mr. Tichenor testified that he had relied upon the men that had gone over to present the case to Mr. Pillsbury as being the necessary witnesses in the case, and he had consented to the hearing and consented to not being represented because he relied on those men that went over there. Two of those men were his employees. Cap-

tain Klotz testified that he never saw Captain Weidemann except when he went over on the ferry-boat the day before when they had some conversation which was not relevant to this particular case, and that he had testified. Then we have Captain Weidemann, himself, who flatly denies he ever did anything in any way, shape, or form to influence any testimony presented to Mr. Pillsbury.

The COURT: I am ready to decide the matter. What have you placed before me, what are you asking for?

Mr. RESLEURE: Just a motion for nonsuit.

The COURT: You are asking for the same, Mr. Murman?

Mr. MURMAN: Yes, your Honor.

The COURT: The whole proof in this case 3056-L has been presented for the purpose of establishing fraud. I am satisfied, after hearing the witnesses, that there apparently has been here mutual mistake, if you might term it such. I have no doubt at all that there was no authority given to Captain Weidemann to undertake the work. I don't see anything in his conduct which indicates to me he was trying to deceive or defraud or get something that he was not entitled to. I think he honestly believed and believes now, probably, that he was employed at that time. Consequently, there is no element of fraud that I can see. This action being predicated upon fraud, the motion for nonsuit is granted.

Mr. GILL: Shall we submit the other case?

Mr. RESLEURE: Yes.

The COURT: The other case turns upon the question of what [85] the form of order is, as to whether the order in its form comes under the ruling made by me in the United Fruit Company case: in other words, whether it was a final decision at the time of the first judgment, or whether it was still open. I presume you, gentlemen, should present those various orders. Are they in evidence now?

Mr. MURMAN: Yes, both the first and the second order are part of the plaintiff's complaint. They are part of the first complaint; they are not part of the second complaint, the complaint that is now before you. In order to make that record complete I think we will have to introduce them in evidence.

The COURT: According to your stipulation, all evidence presented in this case, so far as it bears upon No. 21703-L in Admiralty will be accepted. I will have to review those orders. I am not able to characterize them, as to whether they were permanent orders, and if they are permanent they cannot leave it open to revive it, or whether, on the other hand, it has been kept open properly and therefore would be a good order predicated on the other.

Mr. RESLEURE: We have an additional point in that matter, and that is that it was 60 days after that second order before the second bill was brought—not 30 days as Mr. Gill has told us. It

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Mr. RESLEURE: We have an additional point in that matter, and that is that it was 60 days after that second order before the second bill was brought—not 30 days as Mr. Gill has told us. It

was November 15. The order was September 16. There had been a petition for a rehearing in the meantime which had been decided. A petition for a rehearing is not a reviewable order.

The COURT: Suppose you submit that and prepare briefs on that so I can review it, if you desire to put anything in further.

Mr. RESLEURE: I believe on the actual facts we could start this case all over again and prove Captain Weidemann's case and get the same ruling that Mr. Pillsbury gave on it. We would not want to waive any rights on that if our motion for [86] nonsuit were denied.

The COURT: I thought the second case was being presented entirely on its merits?

Mr. RESLEURE: We have not had Captain Weidemann's testimony on direct examination, or Mr. Pillsbury's testimony.

The COURT: All right, let us proceed.

Mr. PILLSBURY: There is some additional evidence we want on the second case.

The COURT: This is as to 21703-L solely, is it not, because the other case is determined?

Mr. GILL: Yes.

FRANK WEIDEMANN.

Recalled for Defendant;

Mr. RESLEURE: Q. Captain Weidemann, what is your occupation at the present time?

(Testimony of Frank Weidemann.)

A. At the present time I am a watchman in the Alaska Packers Yard.

Q. How long have you been a watchman in the Alaska Packers yard?

A. Since I came out of the hospital; I was out of the hospital about a month.

Q. Outside of any occasional work you may have done about the time of your accident for the Alaska Packers Company, did you ever work for the Alaska Packers Company before?

A. Yes.

Q. How long did you work for them before the accident, and not on odd jobs?

A. The first time I was with the Alaska Packers was in 1906.

Q. And you worked for them for how long?

A. Then I didn't work for a couple of years, but since 1911 I was steadily employed.

Q. Since 1911 you were steadily employed up to what time?

A. The whole time, going to Alaska.

Q. Until what date were you master?

A. The last ship was in [87] 1927.

Q. Then after you worked for J. J. Moore on the "Centennial"?

A. Yes.

Q. After that what work did you do?

A. I did some work in moving pictures, and then I was an officer on an oil boat.

(Testimony of Frank Weidemann.)

Q. Did you go to work for the Alaska Packers again?

A. Then I worked for Mr. Small.

Q. You went to Small on the "Star of Shetland"?

A. Yes.

Q. Where was the "Star of Shetland" located at that time?

A. Where she is located now, in the Alaska Packers shipyard.

Q. How long before your accident was it that you were employed by Small?

A. I don't know exactly, I think eight or nine months.

Q. During those nine months did you have any conversation with Mr. Astrup, or with Mr. Tichenor, or with anyone else in authority at the Alaska Packers with regard to doing any work for the Alaska Packers Company while you were still employed by Small?

A. No, we never had any regular conversation that way.

Q. I am not talking about regular conversation: Did you ever have any conversation?

A. No. The only time was during the summer. The Alaska Packers sold a vessel, and they must have a master to bring the vessel to drydock, and I was the only one around there, and I knew the vessel well, so they told me to go on board and bring it to dry dock.

(Testimony of Frank Weidemann.)

Q. They had a fire over there, didn't they, in the yard?

A. That was just a little before I got hurt.

Q. Did you do any work in connection with that fire?

A. Yes, I was working there a couple of days.

Q. At whose request?

A. I came to the yard on that morning of the fire and I went into the office and I said, "Do you need any assistance?" Mr. Tichenor was there, and he asked me, "What are you doing, Captain?" I said, "I am doing nothing very particular, I just came around thinking maybe I could be [88] of some assistance. He said, "Go right in there and help them with the fire."

Q. Did they say anything about pay at that time?

A. No.

Q. Did they pay you for your work on the fire?

A. Yes.

Q. How much?

A. It was all in a lump. I could not say how much they paid me. I was well satisfied with it. For the few minutes work here and there I thought they paid me well.

Q. On how many different occasions before your accident did they pay you for odd jobs?

A. I can't tell you that, exactly.

Q. Was it more than once?

(Testimony of Frank Weidemann.)

A. I know that in the "Iceland" it was twice, once for the drydock business, and then for rigging up the sails; I was helping them on that.

Q. The custom was to let you run up a certain amount of time that you should work and then pay you in a lump sum for the amount?

A. Yes; there was no understanding exactly, because they treated me very nice and I didn't ask how much I would get for an hour or two.

Q. Was your time kept on the job?

A. Mr. Roberts was doing that generally.

Q. Mr. Roberts was the bookkeeper?

A. Yes.

Q. Did Mr. Roberts keep your time?

A. I think so. I didn't punch no clock or anything like that.

Q. After the accident did they pay you for any odd jobs that you had done previous to the accident?

A. After the accident I didn't get anything.

Q. But were you paid after the accident for work that you had done before the accident?

A. They sent a check or money home, while I was in the hospital. That was while I was in the hospital.

Q. Was that compensation or was that payment for work done?

A. That was payment for work. [89]

Q. While you were in the hospital they paid you for the various odd jobs you had done?

A. Yes, they sent that home.

(Testimony of Frank Weidemann.)

Q. Do you remember how much that check was?

A. No, I can't recollect exactly, but somewhere around $50 or $60, I think.

Q. Did that check for $50 or $60 cover the work that you had done on the "Greenland"?

A. Yes, easily. That was for the fire. The fire was only about fourteen days before that, or ten days before that.

Q. Do you know whether or not the short time that you were on the "Metha Nelson" was paid for?

A. I didn't ask no questions about that because I knew they would make it good if I did a little something else for them.

Q. How many days before the accident did you have the conversation with Mr. Astrup with regard to helping around?

A. That was during the summer.

Q. During the summer?

A. Yes, just here and there.

Q. Did he tell you that you should report to them whenever you saw anything wrong, or did he say, "When you see something wrong go ahead and fix it?"

A. To report it, or if I could fix it myself go to it.

Q. You had that general authority from Mr. Astrup?

A. Yes.

Q. That never had been cancelled?

A. No.

(Testimony of Frank Weidemann.)

Q. He never told you you must report to him first?

A. There was a big hawser in that schooner, the "Metha Nelson," and I was telling Mr. Astrup that hawser did not belong in that schooner. He said, "For God's sake get a couple of men the next day and get it out, that does not belong to the schooner when it is sold, that is worth $500 or $600." He said, "I will give you a couple of men and you go around and gather up the things that you think they will swap." We loaded it all on a scow and discharged it.

Q. You had a conversation with Astrup about going on the "Metha Nelson"?

A. Yes, but not on that particular day that I got hurt. [90]

Q. The day before, or what day was that?

A. Yes, I knew about what I was going to do, but I never knew that draftsman. I knew him by sight. I never worked with him. When he says I held a tape measure he is a liar. I don't know what tape measure he had. I didn't see him. I got introduced to him when the whole bunch was around there. That is the first time I ever knew him.

Q. Undoubtedly you didn't get authority to work there from the draftsman?

A. No.

Q. What did Mr. Astrup tell you would be required of you on the "Nelson"?

A. I could not tell you the words, but to help the draftsman. When Klotz said "They want you

(Testimony of Frank Weidemann.)

there," I didn't rush to the office and ask once more for permission, I thought it was understood, because I had been doing things like that before.

Q. You accepted Mr. Klotz's statement that they wanted you down on the ship?

A. Yes. That is what he said, "They have been hunting for you all afternoon."

Q. You told him you knew what you were wanted for?

A. Yes.

Q. What were you relying on as to what they wanted you for?

A. Mr. Astrup told me a day or so before.

Q. So you were sent there?

A. Yes.

Q. Were you in his company at all times when you went on the ship?

A. Yes, until he went down about half a minute before me.

Q. And you didn't do any actual measuring on the ship, at all?

A. No, I didn't see no draftsman.

Q. What were you on the ship for? What was the reason you were on the ship at that time?

A. I was going to help the draftsman. We were waiting for him until he came.

Q. Did the draftsman eventually come?

A. I didn't see him, I didn't know the man.

Q. You and Klotz went down into the hold?

A. Yes, we were going to look at the map, or plan, or blueprints.

(Testimony of Frank Weidemann.)

Q. You were around there waiting for the draftsman?

A. Yes. [91]

Q. When you were in the hospital did Mr. Tichenor come to see you?

A. Yes, on one occasion I remember well.

Q. What was your condition at that time?

A. I was pretty well shot, but I knew what I was talking about.

Q. In addition to your arms, you had some other injuries—Excuse me, your Honor, I am going back to the first case.

The COURT: It seems to me we have simply covered what he gave before.

Mr. GILL: Q. Captain Weidemann, I have a statement here which was prepared by the book keeper of the Alaska Packers. It shows that on June 30th you received a check, these are all payments made from January 1, 1929 to date. No payments made in 1929 prior to June 30th. On June 30th you were paid for three days at $6.80 a day, making a total of $20.40.

A. I don't remember exactly about that.

Q. Is it your opinion that that is probably correct?

A. I think so.

Q. The next payment was on November 14, 7½ days at $6.80 a day, $51.

A. Yes; I was helping rigging up the ship. I was foreman there. I didn't do any work. I showed

(Testimony of Frank Weidemann.)

them how to do it because they didn't know anything about it.

Q. The question is, is that probably correct?

A. Yes.

Q. You got paid on November 14 for 7½ days at $6.80 a day for labor previously performed?

A. Yes.

Q. Is that probably correct?

A. Yes.

Q. On the 14th you got $51 for work between November 1st and November 14th?

A. I was in the hospital; I don't know how much I got.

Q. You didn't go to the hospital until November 15. From November 1st to November 14th did you work 7½ days during that time for which you received $51, at the rate of $6.80 a day?

A. Yes, I guess so. I got that check after I was in the [92] hospital.

Q. No, you got that money away after you were in the hospital. Did you get paid on the 14th, the day before your accident?

A. No.

Q. Did you get paid on November 30th, $80?

A. I was in the hospital then. My wife must have got it, I didn't get it.

Q. Then you don't know anything about that?

A. No.

Mr. RESLEURE: We don't contest that statement, at all.

Mr. GILL: All right, I will submit it.

Mr. RESLEURE: I would like to find out whether the accident took place on the 13th of November or on the 15th. The testimony before the Commissioner shows the 13th. To-day we have heard about the 15th. If it took place on the 13th then November 14th would be after the accident. I think you will find that the accident took place on the 13th.

Mr. GILL: Any objection to submitting the wage scale?

Mr. RESLEURE: No.

The COURT: It will be received and marked Exhibit 3.

(The document was marked Plaintiff's Exhibit 3.)

WARREN H. PILLSBURY,

called for the Defendant; Sworn.

Mr. MURMAN: Q. Mr. Pillsbury, you are the Deputy United States Employes Compensation Commissioner?

A. I am.

Q. Were you so employed in the fall of 1929?

A. I was.

Q. Do you recall a matter being submitted to you to ascertain an award for an injury to Captain Weidemann?

A. Yes.

(Testimony of Warren H. Pillsbury.)

Q. When did you first hear of that particular injury?

A. May I refer to my notes, or to the original file? The first intimation I had of the injury was a report from Dr. W. C. Adams, which came to my office on December 2, 1929.

Q. What did that report show, in brief, Mr. Pillsbury?

A. That Captain Frank Weidemann was hurt on November 15, [93] employed by Alaska Packers, fell about 15 feet, taken by ambulance to Peralta Hospital, disability possibly three months.

Q. What happened after you received that notice of injury?

A. I communicated I think orally with the Alaska Packers, as they had not reported the injury, and suggested that the report be sent in. I received the first report of injury from them on December 11. On December 20 I received a letter from the Alaska Packers which already has been placed in evidence, which referred to some of the circumstances, and asked me if in my estimation the Alaska Packers Association is responsible for this accident will I please make an award in this particular case in order that they may properly take care of the injuries.

Q. When was that award made?

A. Following that I set the matter for hearing and received an answer and received one or two further letters. The hearing was set for January 7 and continued until January 27.

(Testimony of Warren H. Pillsbury.)

Q. Do your records show that the proper notices were sent out?

A. Yes.

Q. What happened at the hearing?

A. On the 27th of January there were three witnesses present, Captain Weidemann, Captain Astrup, and Captain Klotz. There was no appearance on behalf of the Alaska Packers. I telephoned Mr. Tichenor to ask if he was going to be represented at the hearing. He waived appearance and consented to my going ahead and taking the testimony of the witnesses, so I took the testimony of those three witnesses.

Q. I have here the transcribed hearing, the first hearing on January 27, 1930. It already was admitted in evidence in the first case. I ask you if that is the transcript, and call your attention particularly to the award that you made. [94] Will you advise the Court if that was the award that was made?

A. This is the original of the reporter's transcript on file in my office. I made the award four days later, on February 1, 1930, deciding the case. The original decision is in the file. I have a copy before me, also. In that decision I made the usual findings of fact, special findings of fact with reference to evidentiary facts as to the circumstance of the employment and with reference to the question of disability I made this finding:

(Testimony of Warren H. Pillsbury.)

"That as a result of the injury sustained the claimant was disabled from November 15, 1929 indefinitely and is entitled to temporary total disability compensation at the rate of $25 a week until termination of such disability. The award based on these findings of fact is as follows: Award: That the Alaska Packers Association shall pay to claimant compensation as follows: The sum of $264.28 to and including January 27, 1930, less all payments heretofore made on said account, and the further sum of $25 a week thereafter until the further order of the Deputy Commissioner."

Q. Was there a further order made?

A. Not until about a year and a half later.

Q. Was that an order as the result of the hearing on August 28, 1931?

A. Yes. In the summer of 1931 I instituted some inquiries to find out whether Captain Weidemann was still disabled, and whether compensation was still being paid, and whether permanent disability had resulted. On August 12, 1931 I received a letter from the Alaska Packers Association enclosing a report of final payment and requesting termination of liability under the award. On August 14 I issued the standard form we used in the office, mailing it to Captain Weidemann to acquaint him with the contents of the employer's final report. On August 18, 1931 I received a letter from Captain Weidemann claiming that his hand was still disabled. On August 21 I issued an order setting the

(Testimony of Warren H. Pillsbury.)

case for hearing the date of the hearing to be August 28th, upon the question [95] of whether permanent disability had resulted or whether the Alaska Packers' liability should be terminated. The hearing was heard on August 28, 1931, Captain Weidemann being present in person, and the Alaska Packers Company being represented by a man in their office, I think, not an attorney—being represented by B. P. Thornton, who described himself as assistant to the general superintendent. At that time I received evidence on the amounts paid to Captain Weidemann since the first order; I made an inspection of his hand; I think some medical reports were placed in evidence, if I remember correctly. On September 16, 1931 I issued my second order, which revised the compensation payable in accordance with the later facts since the first order, and in accordance with the extent of the permanent disability as I found it to be.

Q. Was that second order in any way directed toward your original findings of fact as to jurisdiction in this matter?

A. No. I did not re-examine any question of jurisdiction. I was acting under Section 22 of the Longshoremen's Act, which provides for reopening of the case upon ground of changes in disability subsequent to the original order.

Q. And that provision has nothing to do with jurisdictional facts?

A. No. I accepted the first order as being in full force and effect and received evidence only on

the change of disability since the first hearing had been held.

Q. Then the question of employer and employee relationship was not considered at all by you at the time of the second hearing and at the time you made that second order?

A. It was not considered. In the second order I found the date of termination of temporary total disability, I found that the employer had paid the employee his full wages, $150 a month, for thirteen weeks, and gave them the credit for $25 a week; the full compensation read for the thirteen weeks, and I found that compensation was due from November 15, which had been paid, that the right arm reached a permanent stage about November [96] 15, 1930; that he sustained disability amounting to 44 per cent. of the loss of the hand, that he was entitled to compensation for temporary total and permanent partial disability at $25 a week for 114.64 weeks beginning with November 15, 1930, and made an award in accordance with those findings. Sometime after that Mr. Gill, representing the Alaska Packers, called on me and advised me of his interest in the matter. About the expiration of 30 days to the date of that order—one or two days before that, I received from him a petition to set aside all proceedings in the case. That petition should be in this file. I denied that petition on the 30th day after I had entered the order. About the same time I received service of the first bill of complaint for injunction, and I have taken no further

(Testimony of Warren H. Pillsbury.)

action in the case since. The date of my ruling denying the petition for rehearing is October 16, 1931.

Q. When were you served with the complaint in the matter now before the Court, that is, the second proceeding that was instituted in this action?

A. The second bill for injunction was not served on me until about a year after it was filed, November 15, 1932.

Q. And your order had been made on September 16, 1931?

A. Yes. The date of the filing of the second bill was much earlier.

Mr. RESLEURE: It was filed November 16, 1931.

Mr. MURMAN: Yes. That is all.

Cross Examination.

Mr. GILL: Q. It is found in the first finding of February 1, 1930 that as result of the injury sustained the plaintiff was wholly disabled from November 15, 1929 indefinitely, and is entitled to temporary total disability compensation of $25 a week until the termination of such disability?

A. Yes.

Q. Disability may be terminated by a man's return to work?

A. Yes. [97]

Q. And that is what happened in this case, is it not?

(Testimony of Warren H. Pillsbury.)

A. Temporary disability may be terminated by returning to work. There still may be permanent disability.

Q. The award did not make any mention of permanent disability, the first one?

A. I could not tell at that time whether the disability would prove to be permanent or not.

Q. You said in the award, "A compensation order having been issued in this proceeding on February 1, 1930 allowing plaintiff compensation for temporary total disability until the termination thereof, it is further ordered," etc. At the time you made that order you knew, did you not, that the disability had terminated, the temporary total disability had terminated some months prior?

A. At the time of the second order I had before me the proceedings at the last hearing, which showed that Captain Weidemann had been put back at work at full wages shortly after the first hearing.

Q. So that shortly after the first hearing, and as a matter of fact almost before it was filed, Captain Weidemann was restored to his full earning capacity, was he not?

A. That involves some construction of language. I understand that he was put back at full wages with a bad hand.

Q. Yes, that is it.

A. Let me mention this, though, the first order remained in full force and effect until terminated by some later proceeding.

(Testimony of Warren H. Pillsbury.)

Q. It remained in full force and effect, did it not, according to the finding I just read, until termination of disability, or until your order?

A. The award reads, The sum of $264.25 to and including a certain date, and the further sum of $25 a week thereafter until the further order of the Deputy Commissioner. That further order was not made until the second order, a year and a half later.

Q. Is it not a fact that you do not make orders, that you have no authority to make orders for $25 a week unless the man has suffered a loss in earning capacity? [98]

Mr. MURMAN: I object to the question on the ground that it calls for a conclusion of the witness.

Mr. GILL: He has been testifying to conclusions.

The COURT: I suppose he knows, though.

Mr. MURMAN: I don't object to his giving an opinion.

The COURT: He is giving his opinion.

A. There is a procedure involved in answering that question. With the evidence before me at the time I prepared my decision it showed that the man's earning capacity has been restored by being put back to work I would have no authority to award compensation for temporary disability beyond the date he returned to work. The situation before me on the first order was that the man still had a bad hand and was not working.

Mr. GILL: Q. Was it not with regard to that particular phase of awarding compensation for loss

(Testimony of Warren H. Pillsbury.)

of earning capacity that you felt required to put in this finding which I have read, that he is entitled to $25 a week indefinitely, and until the termination of such disability?

A. I make that finding in every case when the evidence before me shows that the man is still sick and has not returned to work.

Q. In other words, it is your effort, when those findings are made in order to encourage an employer to assist an employee to come back and not take the benefits but restore himself?

A. I very much prefer that the man shall go to work at as early a date as possible.

Q. The Act, itself, provides that the employer may at any time stop the running of the $25 a week payment by restoring the employee to his full earning capacity.

A. Had you at any time filed a petition with me reciting that the man had gone back to work it would have been my duty at that time to revise the earlier order in accordance with the new facts, and either to reduce or to stop payments of temporary disability as of the date he returned to work. [99]

Q. But when you came to make the second order there was no question of our being assessed $25 a week after we started paying him wages for services performed?

A. No, and when I made the second order I stopped the temporary disability payments as of the date he returned to work, and then figured the per-

(Testimony of Warren H. Pillsbury.)

manent disability allowance and made a second order upon the new basis of the permanent disability allowed.

Q. And the second order was made on the findings of fact you had previously made in the order of February 1st that Weidemann was our employee?

A. Yes.

Q. And within thirty days of that you received from me a petition to have a new hearing in this matter, did you not?

A. Yes.

Q. In order that we may be allowed to show that Mr. Weidemann at the time of the accident for which you had awarded him $2800 on September 16 was really in our employ?

A. Yes.

Q. And you denied that on the ground you had no authority to reopen and because the showing made in the petition was insufficient on its face?

A. Yes.

Q. And the second case, the one the Court is now considering, was filed within thirty days of that order?

A. Within thirty days of my order denying the petition for rehearing, and within 60 days of the first order.

Q. And are those petitions for rehearing to set aside a part of the record?

A. Yes.

(Testimony of Warren H. Pillsbury.)

Q. I think they ought to go in, inasmuch as this case is a direct appeal from that order.

A. Yes.

Redirect Examination.

Mr. RESLEURE: Q. How did you characterize the first order of February, 1930? Is that a compensation order?

A. The first order of February 1, 1930, is an award of compensation.

Q. The order of September 16, 1931, how is that characterized by you and by your department?

A. The title I placed on that order is, "Order fixing compensation for permanent disability."[100]

Q. Is that a compensation order or a modification?

A. A modification of a compensation order.

Q. It is not in actuality a compensation order?

A. I suppose you would call all orders granting or denying compensation compensation orders, but the first order disposed of all jurisdictional questions and all general questions, and the second order was a modified order which changed the basis of payment in accordance with the later developments.

Q. Your third order denying a petition for a rehearing, is that a compensation order?

A. I would not call it so, it does not grant or deny compensation payments.

Q. That is the one that was made within thirty days of the filing of the second bill of complaint?

A. Yes.

(Testimony of Warren H. Pillsbury.)

Q. The other two orders were considerably prior to thirty days before the filing of the second bill?

A. Oh, yes.

The COURT: Q. In other words, where the man is still ill you make a temporary allotment, holding back the issue of permanent disability, and it might go on from that until a later date when the temporary disability is concluded?

A. Yes.

Q. As soon as the temporary disability is concluded and he goes back to work you then issue another order which embodies in it future damages?

A. I have a little problem there which your Honor has rather embarrassed me with in another case; when the temporary disability is over the employer is entitled to an order stopping the temporary payments. The permanent disability can be measured at that time. There are cases where it is not capable of measurement for six months or a year after that time. In that case I have to find some way of keeping the file open so it can be measured when it is ready for measurement.

Q. That sometimes gets you into difficulty in trying to do that.

A. Yes.

Mr. GILL: Q. The fact is, Mr. Pillsbury, about the two or- [101] ders, that the order of February 1, 1930 required the Alaska Packers Association to pay promptly $264, and to pay $25 a week or restore Captain Weidemann to his full earning capacity. Is that not the effect of that first order?

(Testimony of Warren H. Pillsbury.)

A. You have two kinds of effects there, you have the effect of the order in its own language, and you have the other rights that might accrue from it. They were obliged to pay immediately $25 a week until they got a modification order from me. Under the general law, at any time they put him to work that would reduce or terminate the temporary disability, that is, it would reduce the wage loss and you would then be entitled to an order modifying the former one.

Q. In other words, the Act, itself, specifically provides, in your own interpretation of it, that once this order is made requiring us to pay Weidemann $25 a week we may stop that promptly when we put him back to his full earning capacity, and that right is given us by the statute, is it not?

A. Yes. The moment you reduce his wage loss you are entitled to a change in your liability which you are entitled to have evidenced by a proper order.

The thing becomes effective by virtue of the statute and not by virtue of your order. If we show you within two minutes after you make your order that Weidemann is back to work it stops.

A. You may request a further order, and I would hold a further hearing and make such order as the evidence warrants.

Q. The second award was for some $2860, about ten times as much——

(Testimony of Warren H. Pillsbury.)

A. May I answer further your previous question? Under the facts in this case there would have been quite an embarrassment in the record had you asked for that order the moment you put him back to work, because it was not possible to measure the amount of permanent disability for a year or so afterwards. Under the Court's ruling in the United Fruit Case, had I given you an order releasing you from further [102] liability at that time I could not have given Captain Weidemann his permanent disability allowance when the case became such that the permanent disability could be measured. That is one thing that causes me to keep the order in effect as long as possible where permanent disability is to be anticipated.

Q. Of course, personally I am in close sympathy with keeping your jurisdiction open as far as that is concerned, but I do want to know this: Does the Act, as you understand it and interpret it here in this district, obligate you to indicate to the employer when you give a judgment for $264 that he had better appeal it if he wants to save himself 100 per cent. in the case twenty months later? Is there not some provision in the Act that puts us on notice that we should appeal that $264 judgment in order to save ourselves the embarrassment of being foreclosed forever when you undertake, twenty months later, to give a larger judgment against us?

A. There is no provision in the Act requiring us to procrastinate for twenty months.

(Testimony of Warren H. Pillsbury.)

Q. In other words, if you take your construction of the Act, the question of employment was finally settled by the first finding?

A. Yes.

Q. When that became final you could go on then and build up on that indefinitely the judgments against the Alaska Packers Association, and prevent us from coming back and showing that he was not our employee, though we were unwilling to appeal the case for $264?

A. My construction is that when you get your decision fixing the fact of liability you should take your appeal within thirty days if you wish to contest that question. Thereafter the case will remain open for changes in disability as long as disability of any type continues.

Mr. GILL: That is all.

Mr. MURMAN: There is no question brought up in the pleadings [103] regarding the amount of money paid. There is simply a question of an employer and employee relationship. That is true of the second proceeding as well as the first.

Mr. GILL: Our position in regard to that is that it is unreasonable to require us to appeal to this Court from a judgment of $264 in order to forestall an award in the future. We had no possible way of anticipating it.

The WITNESS: Their doctors knew more about how that hand was getting on than I did. I did not see the hand *against* for a year and a half.

(Testimony of Warren H. Pillsbury.)

Mr. MURMAN: Q. You sent a copy of your award to the Alaska Packers?

A. Yes.

Q. It was received?

A. Yes.

Mr. GILL: We have the award. There is no doubt but what the order was received and it became final.

Mr. RESLEURE: Your Honor suggested that we write briefs on the motion for nonsuit. Shall we brief that point first, or go into the whole matter in one brief? The nonsuit in the first case has been granted. In the second one we make a motion for nonsuit on the ground that the appeal was not filed in time. Your Honor suggested that that matter be briefed.

The COURT: I think you might submit the entire matter at one time instead of dividing it up. How much time do you want, 10, 10 and 5?

Mr. RESLEURE: Yes. The complainants will open. There is one point in this case that I don't think the United States intends to concur in. I think they should have a right to file a brief.

Mr. MURMAN: If I wish to file a separate brief may I do so?

The COURT: Yes.

Mr. GILL: Will your Honor change the order as to time to 20, 20 and 15?

The COURT: Yes, 20, 20 and 15. [104]

[Endorsed]: Filed Jun 11 *135*. [105]

[Title of Court.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on WEDNESDAY, the 11th day of July, 1934, in the year of our Lord one thousand nine hundred and thirty-four.

PRESENT: the Honorable HAROLD LOUDERBACK, United States District Judge.

[Title of Cause.]

This cause having been heretofore submitted, and due consideration having been thereon had, it is ordered that a decree be entered in favor of the Libelant, upon findings of fact and conclusions of law to be filed. [106]

[Title of Court and Cause.]

PROPOSED AMENDED AND ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled proceeding came on regularly for trial on the 5th day of January, 1934, Francis Gill, Esq., of Messrs. Pillsbury, Madison and Sutro, appearing for libelant above named, and J. F. Resleure, Esq., of Messrs. Resleure, Vivell & Pinckney, appearing for respondent Weidemann, and S. P. Murman, Esq., Assistant United States Attorney, appearing for respondent Pillsbury, and evidence

both oral and documentary having been introduced and the matter having been submitted for consideration and decision, now after due deliberation the Court finds as follows:

I.

On February 1, 1930, the first compensation order of respondent Pillsbury was entered, duly establishing the jurisdictional facts and finding that respondent Weidemann suffered temporary total disability as the result of injury to his right wrist, [107] and further ordering that libelant pay to respondent Weidemann the sum of $264.28, to and including January 27, 1930, less such payments theretofore made on account of said compensation, and the further sum of $25.00 per week thereafter until further order of respondent Pillsbury. No proceeding pursuant to Section 21b of the Longshoremen's and Harbor Workers' Compensation Act was filed within thirty (30) days of said award by libelant, and said order became final on March 3, 1931.

II.

On September 16, 1931, a second order of respondent Pillsbury was entered finding respondent Weidemann to be permanently partially disabled due to the injury to his right wrist, and modifying his first compensation order and award of February 1, 1930, to order libelant to pay to respondent Weidemann the sum of $1,025.00 as unpaid accrued compensation due as of August 28, 1931, and the further sum of $25.00 a week thereafter for 60.64

weeks, payable each two weeks. No proceeding pursuant to Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act was filed within thirty (30) days of said award by libelant, and said order became final on October 16, 1931.

III.

On October 16, 1931, a third order of respondent Pillsbury was entered, denying libelant's petition for rehearing and reopening of the supplemental and modifying compensation order of September 16, 1931. No proceeding pursuant to Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act was filed within thirty (30) days of said award by libelant, and said order became final November 15, 1931.

IV.

The above entitled proceeding was filed by libelant on November 16, 1931, after thirty days had elapsed since the third [108] order of respondent Pillsbury was entered on October 16, 1931, denying libelant's petition for rehearing and reopening of the supplemental and modifying compensation order entered September 16, 1931.

V.

Libelant had due and proper notice of the orders of respondent Pillsbury entered on the dates respectively, as hereinabove set forth under Findings I, II and III.

VI.

Respondent Pillsbury has not rendered nor entered any compensation orders and/or orders of any

kind or description affecting respondent Weidemann and libelant, other than the orders hereinabove set forth in Findings I, II and III.

CONCLUSIONS OF LAW.

I.

The orders of respondent Pillsbury rendered on February 1, 1930, September 16, 1931, and October 16, 1931, respectively, are and have become final and binding on libelant and respondent Weidemann, and are not subject to review by libelant in the above entitled proceeding under the provisions of Sections 21(a) and 21(b) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 921a and 921b).

II.

Bill for injunction filed by libelant herein is denied for failure of libelant to file the above entitled proceeding within the thirty days elapsing after the date of entry, to-wit, October 16, 1931, of the third and last order made by respondent Pillsbury pursuant to said Section 21(b) of said Act. [109]

III.

The compensation orders and awards duly made and entered by respondent Pillsbury in favor of respondent Weidemann are hereby affirmed with costs to respondents, and each of them.

IV.

That respondent Weidemann have and recover interest, until paid, at the rate of seven per cent

(7%) per annum, upon the said awards, from the dates when the respective payments ordered thereunder became due and were unpaid.

V.

That the sum of $ is hereby fixed as the fee payable to the proctors for respondent Weidemann, as and for their compensation in resisting the respective complaints for injunction filed in the above entitled proceeding and in equity proceedings No. 3101-K and 3056-L.

Dated: This day of , 1934.

United States District Judge.

[Endorsed]: Lodged Oct. 22, 1934. [110]

NOTICE OF MOTION TO VACATE ORDER JUDGMENT AND ENTER DECREE FOR RESPONDENTS.

To the Alaska Packers Association, a corporation, and Messrs. Pillsbury, Madison and Sutro, its attorneys:

You and each of you will please take notice, and you are hereby notified, that on the 29th day of October, 1934, at the hour of 10:00 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, respondents above named, and each of them, will move the above entitled court, at the courtroom thereof, in the Federal Court and Post Office Build-

ing at Seventh and Mission Streets, in the City and County of San Francisco, State of California, for an order vacating the order for judgment heretofore made by the above entitled court on the 11th day of July, 1934, in favor of libelant, and for an order entering a decree in favor of respondents, and each of them, denying libelant's bill for injunction, pursuant to the proposed amended and additional findings of fact and conclusions of law herewith submitted to the court by respondents.

Said motion will be made on the ground that the ends of justice will be promoted by the granting thereof and the same will be based on this Notice of Motion, upon the proposed Amended and Additional Findings of Fact and Conclusions of law, and upon the attached Memorandum of Authorities, and upon all the records, papers and files in this proceeding.

Dated: This 20th day of October, 1934.

H. H. McPIKE,
United States Attorney.
By S. P. Murman,
Assistant United States Attorney.
Attorneys for Respondent Warren H. Pillsbury.

RESLEURE, VIVELL & PINCKNEY,
Attorneys for Respondent Weidemann.[111]

MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO VACATE ORDER FOR JUDGMENT AND ENTER DECREE FOR RESPONDENTS.

Where the order of the Deputy Commissioner was entered on October 16, 1931, it became final on November 15, 1931, and the suit to review the same, filed by libelant on November 16, 1931, will not lie because same was not filed within thirty days after the date of entry of the order of the Deputy Commissioner.

33 U. S. C. 921(a);

International Stevedoring Co., et al. vs. Marshall, et al.,

(Unreported opinion of District Judge John H. McNary, United States District Court for the District of Oregon, decided Feb. 20, 1933, a complete copy of which opinion is hereunto attached.)

An attack on the order of the Deputy Commissioner under Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 921b) is made too late unless filed within a thirty day limitation provided by Section 21(a) of the Act (33 U. S. C. 921(a)).

Associated Indemnity Corp. v. Marshall, 71 Fed. (2d) 420 (C. C. A. 9), decided July 19, 1934, affirming decision of Dist. Judge John H. McNary, U. S. Dist. Court for the District of Oregon. [112]

[Title of Court and Cause.]

RAFFETY & PICKETT, and
WOOD, MONTAGUE & MATTHIESSEN, for Complainants
W. A. ILLIDGE for Respondent Whittington.

McNary, District Judge:

This case is before the court upon a motion to dismiss the cross complaint of James Whittington, for the reason that it was not filed within the time allowed by law.

This cross complaint is in the nature of a suit to review the findings of the deputy commissioner and Title 33 U. S. C. A. Sec. 921, provides that, unless proceedings for the suspension or setting aside of a compensation order are instituted the order will become final at the expiration of the thirtieth day thereafter.

The order of the deputy commissioner was entered on October 4, 1932, and the suit in review thereof was filed on November 4, 1932.

Counsel for respondent contends that this court should follow the construction placed by the Supreme Court of this state upon the Oregon statute, relating to the computation of time. In the computation of time in which the act shall be done, the statute provides that the first day shall be excluded and the day on which the act is done shall be included in the count. There is lack of uniformity in the decisions of the state court upon the presented question. In the case of U. S. National Bank v. Shefler, 77 Or. 579, the court held that the day on

which the act is done shall not be the first day to be excluded. This opinion has been criticised by the same court in several recent decisions, one of which is the case of Steeves v. Steeves, 139 Or. 261, where the court said: "We are of the opinion that what the legislature intended is that the defendant, when served within the county where the action was begun, shall have ten full days in which to answer.

By excluding only the first day and including the last, any moving party would have full ten days by the end of the last day. Here the full days expired at the end of November 3, 1932.

If this court were called upon to construe the Oregon statute in a case originating under its laws, it might be inclined to follow the opinion in the 77 Oregon Case. However, [113] the question involved calls for the construction of an act of the Congress, and is not controlled by the Oregon laws regarding the computation of time. Consequently the court will follow the great weight of American authority to the effect that the day only on which the act shall be done will be excluded.

The motion to dismiss will be allowed.

[Endorsed]: Filed Oct. 22, 1934. [114]

[Title of Court.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday the 14th day of December, in the year of our Lord one thousand nine hundred and thirty-four.

Present: the Honorable HAROLD LOUDERBACK, United States District Judge.

[Title of Cause.]

The motion to vacate order for judgment and to enter decree for respondents having been submitted and being now fully considered, it is ordered that said motion be and the same is hereby denied. [115]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled proceeding came on regularly for trial on the 5th day of January, 1934, Francis Gill, Esq., of Messrs. Pillsbury, Madison & Sutro, appearing for libelant, and J. F. Resleure, Esq., of Messrs. Resleure, Vivell & Pinckney, appearing for respondent Captain Frank Weidemann, and S. P. Murman, Esq., Assistant United States District Attorney, appearing for respondent Warren H. Pillsbury, Deputy Commissioner Thirteenth Compensation District under the

Longshoremen's and Harbor Workers' Compensation Act, and evidence, both oral and documentary, having been introduced, and the matter having been submitted for consideration and decision, now, after due deliberation, the court finds generally in favor of libelant and against respondents on the issues raised by the respective pleadings, and further finds as follows:

I.

Respondent Weidemann, at the time of the injury for which [116] compensation was awarded by respondent Pillsbury, was the master of the "Star of Shetland", whose owner was one Arthur E. Small.

II.

Respondent Pillsbury, with the exercise of reasonable care, should have known prior to entry of the compensation order and award of February 1, 1930, that respondent Weidemann was not an employee of libelant, and that the injury alleged by him was not within the purview of the Longshoremen's and Harbor Workers' Compensation Act. The evidence upon which respondent Pillsbury assumed jurisdiction and entered all orders and awards against libelant is completely transcribed and appended hereto.

III.

The order of February 1, 1930, did not put libelant on notice that it was not a final award in the proceedings pending before respondent Pillsbury, or that libelant might be liable to respondent Weide-

mann for a greater sum than that awarded in said order. The fact that libelant did not within thirty (30) days of said award against it in the sum of two hundred sixty-four and 28/100 dollars ($264.28) seek a review thereof in this court does not preclude libelant from recourse to this court for a review of respondent Pillsbury's order of October 16, 1931, refusing to set aside his second and subsequent award in the sum of two thousand five hundred and thirty-one dollars ($2,531) entered against libelant on September 16, 1931.

IV.

Libelant, upon receipt of the order of February 1, 1930, aforesaid, paid respondent Weidemann the sum of two hundred sixty-four and 28/100 dollars ($264.28) awarded therein and arrested the payment of the twenty-five dollar ($25) weekly temporary disability payments therein awarded, as it had a right to do, by employing [117] respondent Weidemann from January 17, 1930, at an average weekly wage equal to that he received before the injury and he, therefore, suffered no loss in his wage-earning capacity after January 17, 1930, to and including the period set out in respondent Pillsbury's second order and award of September 16, 1931, awarding respondent Weidemann the sum of two thousand five hundred and thirty-one dollars ($2,531).

V.

Libelant properly petitioned respondent Pillsbury on October 13, 1931, for an order suspending said

compensation order and award of September 16, 1931, and made adequate showing thereon, and respondent Pillsbury's order denying said petition on October 16, 1931, was an abuse of administrative and judicial discretion reviewable by this court under section 21 of the Longshoremen's and Harbor Workers' Compensation Act.

VI.

~~H.L.~~

This proceeding, having been brought within thirty (30) days of respondent Pillsbury's order of October 16, 1931, is within the time prescribed by section 21 of the Longshoremen's and Harbor Workers' Compensation Act, and the validity of that order is properly here for review and for determination of the rights of the parties thereto.

~~H.L.~~

CONCLUSIONS OF LAW.

I.

The order of respondent Pillsbury denying libelant's petition for rehearing and for setting aside previous compensation orders in case No. 238-15, claim No. 237, pending before the United States Employees' Compensation Commission, Thirteenth Compensation [118] District, in which Captain Frank Weidemann is claimant and Alaska Packers Association, libelant herein, is the employer, is not in accordance with law.

II.

Respondent Weidemann is entitled to take nothing from libelant, the employer, in said proceeding pending before respondent Pillsbury, and libelant is entitled to have respondent Pillsbury's compensation order and award of September 16, 1931, wholly suspended and set aside.

III.

Libelant is entitled to a permanent injunction as provided in section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act enjoining respondent Pillsbury from enforcing his compensation order and award of September 16, 1931.

IV.

Libelant is entitled to recover from respondents his costs of suit on its behalf expended.

Dated: December 17, 1934.

(Sgd.) HAROLD LOUDERBACK,
United States District Judge. [119]

EXHIBIT.

United States Employees' Compensation Commission before Warren H. Pillsbury, Deputy Commissioner 13th Compensation District

Claim No. 237

Case No. 238-15

CAPTAIN FRANK WEIDEMANN,
Claimant,

vs.

ALASKA PACKERS ASSOCIATION,
Employer.

TRANSCRIPT OF TESTIMONY AT HEARING.

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission, at the Mills Building, San Francisco, California, on Monday, the 27th day of January, 1930, at 11:30 o'clock A. M.

Appearances:

Claimant in person.

Employer Alaska Packers not represented.

Witness	Page
Captain Frank Weidemann	2
Captain R. E. Astrup	13
Captain Alvin H. A. Klotz	18 [120]

Mr. PILLSBURY: In connection with the absence of a representative of the Alaska Packers at this morning's hearing, the record may show previous correspondence on this case with the Alaska Packers Association, consisting of letter of A. K. Tichenor, general manager, on Dec. 20, 1929, my reply of Dec. 23d, and defendant's answer on form U. S. 215, my letter of Jan. 8, 1930, defendant's letters of Dec. 27, 1929 and Jan. 14, 1930. It appears from the above that the Alaska Packers wishes to submit the matter of Captain Weidemann's injury to me for fixing of facts of responsibility, and that the answer is not to be taken as a full admission of liability.

I telephoned Mr. Tichenor this morning to ascertain if he wished to be represented at this morning's hearing. His reply was that he did not think it necessary to be represented and wished to submit the matter for decision upon the statements of witnesses to be taken this morning in his absence.

CAPTAIN FRANK WEIDEMANN,

claimant herein, being first duly sworn, testified as follows:

Mr. PILLSBURY:

Q. Your name is F. Weidemann?

A. Frank Weidemann.

Q. Your address is what?

A. 2160 Buena Vista Av.

Q. Alameda?

A. Yes.

(Testimony of Captain Frank Weidemann.)

Q. What was your occupation on Nov. 13th last, the day of your injury?

A. I was master of the vessel the Star of Shetland.

Q. You say you were master?

A. Yes, sir.

Q. Was the boat in commission?

A. No, she was laid up but she was going to go in commission. She is lying there yet.

Q. You were acting as ship keeper or watchman? [121]

A. No, master.

Q. Care taker?

A. Yes, I took care of her, like all the masters do during the winter time when the vessels lay up.

Q. There was no crew on board?

A. No.

Q. Who employed you to do that work?

A. Mr. Small.

Q. Arthur E. Small?

A. Yes.

Q. Of 866 Tremaine Ave., Los Angeles?

A. Yes.

Q. As I understand it, the Alaska Packers Association had not hired you to act on board the Star of Shetland at that time?

A. No.

Q. You were not working for the Alaska Packers in your work on the Star of Shetland?

A. No, sir.

Q. Now, you were hurt on board the boat Metha Nelson?

(Testimony of Captain Frank Weidemann.)

A. Yes.

Q. And that boat belonged to the Alaska Packers Association?

A. Yes, sir.

Q. How did you happen to be on board that boat at the time of your injury?

A. Well, Mr. Astrup asked me if I wouldn't help a draftsman to measure out a room, measure out the hold, to hold tape measures and things like that.

Q. Who is Mr. Astrup?

A. He is the superintendent of the yard.

Q. For what company?

A. For the Alaska Packers.

Q. What did you do when he asked you?

A. I was on board the Shetland then and I said, "Sure, I will go down there right after dinner. It was close to 12 o'clock then, and I said, "There is lots of time after 12 o'clock."

Q. So you went on board the Metha Nelson after lunch?

A. Yes. Well, about 2 o'clock or somewhere around there.

Mr. PILLSBURY: Now, going back to the Star of Shetland, the defendant's letter states that Mr. Small had recently purchased the Star of Shetland from the Alaska Packers Association. [122]

Q. That is correct, is it?

A. That is what I understood, yes. That is what I have been told, anyhow.

Q. Where was the Star of Shetland at the time you were hurt?

(Testimony of Captain Frank Weidemann.)

A. She was lying right close by the Metha Nelson, maybe 600 or 800 feet ahead of her.

Q. Was that at the yards of the Alaska Packers Association?

A. Yes.

Q. Had you been on the Star of Shetland before it was sold to Mr. Small?

A. Well, I was on board about 8 or 9 months.

Q. That is, you had been the master of the Star of Shetland under the Alaska Packers?

A. No, not for the Alaska Packers. I was hired from Mr. Small. I got introduced to him and he put me on board.

Q. Had you had any work connection with the Star of Shetland before that, before Mr. Small hired you?

A. No.

Q. Had you been working for the Alaska Packers Association before Mr. Small hired you?

A. Oh, yes, yes.

Q. For how long?

A. About 20 years, somewhere around there.

Q. Were you working for them at the time Mr. Small hired you?

A. No.

Q. How long had you been out of their employ?

A. About a year and a half.

Q. Now, what did you do that afternoon?

A. Well, I was going to go down in the hold, and as far as I know——

(Testimony of Captain Frank Weidemann.)

Q. That is on the Metha Nelson?

A. Yes.

Q. You went over to the Metha Nelson?

A. After dinner I was on the Star of Greenland and was going to take some inventory books out of there because she was going to be sold, too, and then Captain——[123]

Q. For whom were you taking that inventory on the Star of Greenland, for the Alaska Packers or for Mr. Small?

A. No, for the Alaska Packers.

Q. How long were you on the Star of Greenland that day?

A. Oh, I think about an hour, somewhere around there.

Q. Then you went from there to the Metha Nelson?

A. Yes. I would have stayed longer in the Greenland but Captain Klotz came on board the Greenland—he was on the Shetland first. He didn't know I was on the Greenland, and then he came on the Greenland and told me if I wouldn't go and help the draftsman on the Metha Nelson for a while and I said, "Sure", I would go right over there.

Q. Now, during the time that you were on the Star of Shetland had you done other work for the Alaska Packers?

A. Oh, worked on and off, just to help them out, little things here and there, because it was summer

(Testimony of Captain Frank Weidemann.)

time I was there and sometimes they are kind of short of men.

Q. Had you received any pay from the Alaska Packers for any of that work?

A. Oh, yes, I got $150 a month. Before that, you mean?

Q. Before Nov. 13th had they paid you for any of this incidental work?

A. Yes, I got some money.

Q. What was your arrangement with the Alaska Packers?

A. I had no arrangement at all with the Alaska Packers in one way. I was employed by Mr. Small; but there was little items to be done sometimes and they would say, "Go ahead and do it, if you want to." Like they had a fire there once in the Terminal and I was helping.

Q. Did you get paid by the Alaska Packers for that?

A. Yes.

Q. What arrangements did they make with you?

A. Nothing at all. They just gave me what they thought was right. [124]

Q. This taking of an inventory on the Star of Greenland, were you to be paid for that?

A. No, I done that more like for a favor because I know all them vessels and I have been in most all of those ships and I know more about them than strangers.

(Testimony of Captain Frank Weidemann.)

Q. Was there any understanding that you were to be paid for doing this work on the Metha Nelson the day you were hurt?

A. No, not particular, no.

Q. Now, what was the last job you had done for the Alaska Packers before you got hurt that you drew some pay for?

A. Well, I think it was that fire.

Q. How long ago was that?

A. I think four weeks, three or four weeks before. I don't know exactly when the fire was. Then I got paid for the Star of Iceland when she was sold to a Japanese concern. I helped them a few days because I was the last master on that boat and I knew more about it than a stranger.

Q. Who paid you for that work?

A. The Alaska Packers.

Q. When was that?

A. I don't know exactly. It was about 2 or 3 months before that.

Q. Was it during the time you were on the Star of Shetland?

A. Yes. I was on the Star of Shetland, employed at the same time.

Q. Was anything said about whether you would be paid for the work that afternoon on the Star of Greenland and the Metha Nelson?

A. No, there was nothing exactly said.

Q. Have you been paid since for your time on those two jobs?

(Testimony of Captain Frank Weidemann.)

A. Yes, I was paid for the Greenland and the Metha Nelson.

Q. When were you paid?

A. When I was in the hospital. It was sent to my home.

Q. How much were you paid?

A. I don't know exactly.

Q. Do you know whether that was pay for your time on those [125] two boats or whether it was payment because you had been hurt?

A. No, I was paid for what I was doing. Odd jobs around the yards, like for the Iceland and for some similar vessels, doing odd jobs.

Q. Who kept a record of your time on those odd jobs?

A. Well, the bookkeeper in the Alaska Packers yard usually keeps the record.

Q. And it is your understanding that he kept a record of your time on the Star of Greenland on the afternoon of Nov. 13th and also on the Metha Nelson?

A. I hardly believe he did because it was more odd jobs. I don't know whether he knew I was on there. I don't know whether the bookkeeper knew I was down there because there were so many little odd jobs.

Q. You weren't on any regular pay from the Alaska Packers?

A. No.

(Testimony of Captain Frank Weidemann.)

Q. But from time to time you received some pay for odd jobs?

A. Oh, yes.

Q. Now, did you have any particular intention in mind for those two jobs on the afternoon of Nov. 13th, whether your time was to be turned in for them and payment received or not?

A. They didn't put in time for me, but I trusted them because I had been employed 20 years for them and they treated me fair all the time, and I thought they would give me a little compensation for that if I helped them along here and there, and they did.

Q. At the time you did these odd jobs on the Star of Greenland and the Metha Nelson on the afternoon of Nov. 13th did you think the Alaska Packers would pay you for your time on those two odd jobs?

A. Yes, I thought they would make it good because they always treated me right. I thought I would get a few dollars for it.

Q. You expected to be paid for those two jobs, then?

A. Yes. [126]

Q. How would the company know you had done that work?

A. Oh, the bookkeeper keeps a kind of record and the superintendent told me there was a little odd job. Mr. Astrop told me, "Once in a while if I see things I will tell you", because there was no one else to do it during the summer.

(Testimony of Captain Frank Weidemann.)

Q. Now, how did you get hurt?

A. I went down in the hold and I don't know myself exactly if I knocked my head against a strong back or something but I simply fell down and I was unconscious, and I was down there unconscious. I had been down in that hold 3 or 4 times before that the same day. That ladder was steady and nothing carried away so far as I know.

Q. At the time you were going down into the hold what were you going down for?

A. I was going to help this draftsman, but he didn't happen to be there yet. I seen the plans down there, lying down and I thought I would go and have a look at the plans.

Q. When you went on board the Metha Nelson did you expect to find him there?

A. Yes, I thought he would be there already but he wasn't. The only man that was along with me was Captain Klotz.

Q. You had not been drinking any that day?

A. Oh, no, I don't drink at all.

Q. And you weren't trying to hurt yourself?

A. No. I certainly wouldn't have gone down there if I had felt dizzy.

Q. The Alaska Packers have furnished you your full medical treatment?

A. Yes.

Q. And you haven't been put to any expense?

A. No.

(Testimony of Captain Frank Weidemann.)

Q. What wages were you earning on the Star of Shetland?

A. That man owes me 5 months, 6 months, yet. It is nothing else but promises.

Q. What did he promise you?

A. He promised me $150 the first couple of months and then [127] he said it would be $200, and after that when I was at sea it would be $250 and 20%. That would be $300, but it is nothing but promises. I haven't got it in black and white.

Q. At the time you were hurt do I understand you were to be paid at the $200 a month rate at that time?

A. Yes. I only got paid up to June. Up to then he paid me at the $150 rate. No, the last month he paid me $200.

Q. What month was that?

A. June.

Q. The Alaska Packers have been paying you $150 a month compensation since you were hurt?

A. Yes, sir.

Q. And they are still paying that?

A. Yes.

Q. What is your condition at this time?

A. Fine. I am all right except for the arm and hand. I have not got no power in my hand because all those nerves—I was in a cast for 5 weeks.

Mr. PILLSBURY: Report of Dr. W. C. Adams of Nov. 29th on form U. S. 204, with attached slip over his signature is filed in evidence at this time.

(Testimony of Captain Frank Weidemann.)

These reports show dislocated fractures of the right humerus at the surgical neck and at the lower end of both radii, with fractured ribs and puncture of right lung.

Q. Did you injure both wrists?

A. Yes, both wrists.

Q. Are you able to go back to work yet?

A. No, I can hardly walk because my feet swell. I was too long in bed and there was no circulation in the legs.

Q. When did you leave the hospital?

A. January 6th.

Q. Are you still under the doctor's care?

A. Oh, yes, I go 3 times a week.

Q. The doctor has not yet told you you could return to work?

A. No. I am supposed to lie down and take it easy.

Q. Is there anything else you would like to state?

A. No. [128]

CAPTAIN R. E. ASTRUP,

being first duly sworn, testified as follows:

Mr. PILLSBURY:

Q. What is your full name?

A. R. E. Astrup.

Q. Your occupation?

A. Superintendent of the yard, Alaska Packers yard in Alameda.

(Testimony of Captain R. E. Astrup.)

Q. And you were such at the time of Captain Weidemann's injury?

A. Yes.

Q. You have just heard his testimony as to what he was doing around the yard; is that correct, so far as you know?

A. Yes, that is just about correct.

Q. That is, he was employed at that time by Mr. Small on the Star of Shetland, which Mr. Small had purchased?

A. Yes.

Q. And was he doing some odd jobs around the yard from time to time for the Alaska Packers?

A. Yes. During the summer he did quite a few small jobs. We had people coming over there looking at our vessels, prospective buyers, and at the time we sold the Iceland he stayed on board it and helped out, as mending sails, etc.

Q. Was he paid for those various small jobs by the Alaska Packers?

A. Yes. To the best of my knowledge he was paid on two occasions. We never kept any tab of his time. We just gave him a lump sum, what we thought would be right.

Q. Did you feel yourself free to call upon him from time to time for assistance?

A. Yes.

Q. And was it your intention to pay him when you would have him help you?

A. Oh, yes, we always intended to remunerate him.

(Testimony of Captain R. E. Astrup.)

Q. This work that he did on the afternoon of Nov. 13th on the Star of Greenland and the Metha Nelson, was it your intention that he should be paid for the time?

A. Well, we probably would. He had been paid a short time before that, I think and naturally if he spent 15 minutes or [129] a half an hour on some job we probably didn't figure to pay him just for that, but in case he had done some more we would naturally give him some money for it.

Q. Now, with reference to these two jobs on the afternoon that he was hurt, had you come to any definite conclusion or did you have any intention at the time he did them that that would ultimately be included in the time for which he was to be paid?

A. I didn't exactly have that in mind at the time I asked him because it wouldn't have been more than a 15 or 20 minute job that he was called on to do.

Q. Did you have any understanding with him that you would not pay him for that time?

A. No.

Q. Did he say anything to you up to the time he was hurt as to whether he was to be paid for these two small jobs?

A. No, we never had any understanding about pay whatsoever. We used to call on him now and then, especially during the summer as we didn't have anybody in the yard. They were all up north

(Testimony of Captain R. E. Astrup.)

and we used to call on him quite often and naturally intended to pay him for his services. There was no set amount or no agreement whatsoever.

Q. Was any record kept of his time?

A. No, no record kept of it.

Q. How would you estimate how much he should be paid?

A. I generally used to keep track of it myself, like estimate that he had so many days coming, and then we used to pay him for so many days.

Q. How did you figure that up?

A. I believe there was two occasions he was paid. After the Star of Iceland left I think he was paid somewhere around $60. I believe that was the amount, I think. He was paid once after that but I don't remember the amount now.

Q. Did you call on him more often because of the fact that he was paid occasionally than you would have done if you [130] hadn't paid him at all?

A. No, during the summer we had to call on him. We had nobody else we could call on. There is hardly any men in the yard in the summer. They all go up north except the bookkeepers and myself and janitor, and Mr. Weidemann is a master mariner and naturally he was a handy man to call on when there was anything to do around ships.

Q. You didn't expect, I take it, to get a large amount of work from him without paying him for it?

(Testimony of Captain R. E. Astrup.)

A. No, I believe he has been very liberally paid for what he has done. In fact, I believe he probably got more than he should have.

Q. What I am trying to find out is whether these two jobs he did on the afternoon he was hurt were done on a clear understanding he would be paid for them sometime?

A. Evidently he would have been paid sometime for them if he had done any more work later on, but if he hadn't been called on after that I don't think he would have gotten anything for it.

Q. That is, if he did more work later on you would lump this time in with the later time?

A. Yes.

Q. I suppose you wouldn't have called on him as often as you did if you were not paying him for some part of the work?

A. No.

Q. You felt free to call on him, did you, at any time you wanted him?

A. Yes, and he was always willing. I think if we hadn't paid him he would have done the same as he did. He was always willing to help out.

Q. Do you know anything about the accident, how he happened to get hurt?

A. I was in the yard at the time.

Q. You had asked him, I believe, to help the draftsman in measuring the Metha Nelson?

A. Yes, I told our draftsman to go aboard the Metha Nelson and take some measures in the hold

(Testimony of Captain R. E. Astrup.)

and I told the draftsman [131] to go in the stock-room to get one of the stock clerk to help him, and I told him, "If you need any other assistance call on Weidemann," because his boat was lying right close by the Metha Nelson and there was nobody else within quite a distance. It just happened he couldn't get the party to help him I wanted to go along with him, and he got Captain Klotz, and I understand on the way down they met Captain Weidemann and asked him to go along. They could have got along without him but I suppose the draftsman when I told him he could get Captain Weidemann if he wanted to, I suppose he thought he had to.

Q. You didn't ask him to go then?

A. No.

To Mr. WEIDEMANN: Who asked you to go on board the Metha Nelson?

CLAIMANT: Captain Klotz.

CAPTAIN ALVIN H. A. KLOTZ,

being first duly sworn, testified as follows:

Mr. PILLSBURY:

Q. What is your name?

A. Alvin H. A. Klotz.

Q. What is your address?

A. 60A Angelina St., San Francisco.

Q. Your occupation?

A. Master of the Steamer Kanak.

(Testimony of Captain Alvin H. A. Klotz.)

Q. Are you employed by the Alaska Packers?

A. Yes.

Q. And you were employed by them on Nov. 13th last?

A. Yes, sir.

Q. What do you know about Captain Weidemann's injury?

A. I was on the Steamer Kanak and I had done a little work and at that time I did not know the fellow was a draftsman in the yard of the Alaska Packers but he came up to me and asked if I knew where Captain Weidemann was and I said, "Yes, he must be on the Star of Shetland" and he said "Well, I *d*ouldn't find him." That is all he said and he walk away again.

Q. That is the draftsman?

A. Yes. About a half hour later [132] he came up to me again and he said he had to get the measurements on the Metha Nelson and asked if he couldn't find Captain Weidemann if I wouldn't give him a hand, and I said, "Absolutely", and I kept on working as I had some tools I just put away, and he walked away towards the yard, not towards the ships. About 10 minutes later I walked over to the Metha Nelson and on the way over Captain Weidemann was standing in the gangway of the Star of Greenland. He was just ready to leave the Star of Greenland and I told him a man was looking for him, and he said, "Oh, I know who that is. We were working yesterday morning."

(Testimony of Captain Alvin H. A. Klotz.)

I said, "He wanted you to go on the Metha Nelson," so Captain Weidemann said, "All right, we will go," and we both of us went on board the ship, but there was no draftsman there. His plans was lying down and we sat down on the hatch, both of us, and talked about 15 minutes. First we looked around if the draftsman was anywhere to be seen on board the ship but we couldn't see him, so we sat on the hatch and waited. The draftsman was the first one to enter the hold. He went down in the Metha Nelson. I was the second, and Captain Weidemann was coming last down in the hold, and I looked at him——

Q. Had the draftsman come by that time?

A. Yes, sir, the draftsman was in the hold. He was the first one to go in the Metha Nelson.

Q. After you got there the draftsman——

A. We never went in the hold until the draftsman came. The draftsman was first and I was second and Captain Weidemann was the last to come down the hold, and I looked at him as he entered the hold and he just got his head inside the hold and all of a sudden he simply fell down almost in front of me.

Q. What did the draftsman say to him when the draftsman came?

A. The draftsman did not say anything then so on account I was there I said to Captain Weidemann, "I guess we will stay here, too, and I had

(Testimony of Captain Alvin H. A. Klotz.)

done a little work on the ship and I had put [133] my tools away and it was getting towards afternoon anyway. I think it must have been around 2 or 2:30 I said, "We had just as well stay here," and I was going to stay with Captain Weidemann and the draftsman if they needed my assistance to give them any help.

Q. You were not the stock clerk that was mentioned?

A. No, sir, I am master on the Steamer Kanak.

Q. And it is your understanding that when the draftsman came up and went on the Metha Nelson with you he didn't say anything to Captain Weidemann?

A. Not that I know of.

To Captain WEIDEMANN: Do you remember the draftsman coming on board?

Captain WEIDEMANN: No, sir, I looked for him, I don't know his name.

Mr. PILLSBURY: You don't remember him coming?

Captain WEIDEMANN: No, I don't even know he was down in the hold.

Mr. PILLSBURY: Were you unconscious after your injury?

Captain WEIDEMANN: Yes, I didn't know anything about it until they hauled me out. I didn't know anything until I was in the receiving hospital and I woke up. I didn't know I was hurt. I said "You phone my wife I will be home in a few minutes."

(Testimony of Captain Alvin H. A. Klotz.)

Captain KLOTZ:

A. The draftsman and myself rolled Captain Weidemann over. He fell down on his side. He had one leg underneath his body and we straightened everything out, and he was absolutely unconscious, and we rolled Captain Weidemann over on his side, and I hurried up on deck to get medical assistance. There was nothing carried away. The ladder was solid as far as I know.

Q. Do you know anything about the circumstances under which Captain Weidemann did occasional work for the Alaska Packers? [134]

A. I don't know anything about it at all. I couldn't say. I know he was on the Star of Shetland. That is all I know. He worked with us when we had the fire at the Encinal Terminal. I also was over there.

Q. Do you know whether Captain Weidemann was to be paid for the work he did that afternoon?

A. No, sir, I don't know anything about it.

Hearing closed.

[Endorsed]: Filed Dec. 18, 1934. [135]

In the Southern Division of the United States District Court, for the Northern District of California.

In Admiralty No. 21,703

ALASKA PACKERS ASSOCIATION, a corporation,

Libelant,

vs.

WARREN H. PILLSBURY, Deputy Commissioner Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and Captain Frank Weidemann,

Respondents.

DECREE.

This cause came on regularly for trial in the above entitled court and was heard on the 5th day of January, 1934, and the court sitting without a jury and evidence having been introduced on behalf of the libelant and respondents, and after trial and argument, the court having considered the law and evidence, and having made its findings of fact and conclusions of law herein;

Now, Therefore, it is ORDERED, ADJUDGED and DECREED that the order of the respondent Warren H. Pillsbury, Deputy Commissioner, Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act,

denying libelant's petition for rehearing and for setting aside previous compensation orders in case No. 238-15, claim No. 237, pending before the United States Employees' Compensation Commission, Thirteenth Compensation District, in which Captain Frank Weidemann is claimant and Alaska Packers Association is the libelant, be, and the same is, hereby set aside; and

It is further ORDERED, ADJUDGED and DECREED that the compensation order and award made by respondent Warren H. Pillsbury, Deputy Commissioner, Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, on September 16, 1931, be, and the same is, hereby suspended and set aside; and

[136]

It is further ORDERED, ADJUDGED and DECREED that the respondent Warren H. Pillsbury, Deputy Commissioner, Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, be, and he is, hereby permanently enjoined from enforcing his compensation order and award of September 16, 1931; and

It is further ORDERED, ADJUDGED and DECREED that respondent Captain Frank Weidemann take nothing from libelant on account of the injury alleged in case No. 238-15, claim No. 237, pending before the United States Employees' Compensation Commission, Thirteenth Compensation District, or by reason of any orders therein entered; and

It is further ORDERED, ADJUDGED and DECREED that libelant have judgment against respondents for its costs of suit in its behalf expended.

Dated: December 27th, 1934.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Dec. 27, 1934. Entered in Vol. 29 Judg. & Decrees at page 459. [137]

[Title of Court and Cause.]

RESPONDENT PILLSBURY'S NOTICE OF APPEAL.

To Alaska Packers Association, a Corporation, and to Messrs. Pillsbury, Madison and Sutro, Proctors and Attorneys for Libelant, and to the Clerk of the above-entitled Court:

You, and each of you, will please take notice, and you are hereby notified that Warren H. Pillsbury, as Deputy Commissioner of the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, Respondent in the above-entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from that portion of the decree entered in favor of Libelant in the above-entitled cause on the 27th day of December, 1934, enjoining Respondent Pillsbury from enforcing his order and

award of September 16, 1931, and setting aside said order and award and in addition thereto Respondent Pillsbury's order of October 16, 1931, such portion of said decree hereby appealed from reading as follows:

"Now, Therefore, it is ORDERED, ADJUDGED and DECREED that the order of the respondent Warren H. Pillsbury, Deputy Commissioner, Thirteenth Compensation Dis- [138] trict under the Longshoremen's and Harbor Workers' Compensation Act, denying libelant's petition for rehearing and for setting aside previous compensation orders in case No. 238-15, claim No. 237, pending before the United States Employees' Compensation Commission Thirteenth Compensation District, in which Captain Frank Weidemann is claimant and Alaska Packers Association is the libelant, be, and the same is, hereby set aside; and

It is further ORDERED, ADJUDGED and DECREED that the compensation order and award made by respondent Warren H. Pillsbury, Deputy Commissioner, Thirteen Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, on September 16, 1931, be, and the same is, hereby suspended and set aside; and

It is further ORDERED, ADJUDGED and DECREED that the respondent Warren H. Pillsbury, Deputy Commissioner, Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, be, and he is, hereby

permanently enjoined from enforcing his compensation order and award of September 16, 1931."

Dated this 22nd day of March, 1935.

H. H. McPIKE,
United States Attorney
S. P. MURMAN,
Asst. United States Attorney
Attorneys and Proctors for and on behalf of Respondent Warren H. Pillsbury.

[Endorsed]: Filed Mar. 25, 1935. [139]

NOTICE OF APPEAL AND APPEAL.

To the Libelant above named, and to Messrs. Pillsbury, Madison & Sutro, its proctors:

YOU, and EACH OF YOU, will please take notice that the above named respondent, Frank Weidemann, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of the above entitled District Court dated December 27, 1934, and entered and filed herein on the 27th day of December, 1934; and from each and every part of said decree.

Dated: March 26, 1935.

RESLEURE, VIVELL & PINCKNEY,
Proctors for Respondent Weidemann.

[Endorsed]: Filed Mar. 27, 1935. [140]

[Title of Court and Cause.]

RESPONDENT PILLSBURY'S ASSIGNMENTS OF ERROR.

Comes now Warren H. Pillsbury as Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, one of the appellants herein, and pursuant to his notice of appeal from a portion of the decree filed in favor of libelant herein, hereby assigns error to be reviewed on appeal by the Circuit Court of Appeals for the Ninth Circuit, to-wit:

First: The District Court erred in denying respondents' motion to vacate order for judgment for libelant and enter decree for respondents.

Second: The District Court erred in that it refused to approve and sign the amended and additional findings of fact and conclusions of law proposed by respondents, and file the same as its findings of fact and conclusions of law.

Third: The District Court erred in entering a decree for libelant setting aside Respondent Pillsbury's orders of September 16, 1931, and October 16, 1931, and enjoining Respondent Pillsbury from enforcing his order and award of September 16, 1931. [141]

Dated this 22nd day of March, 1935.

H. H. McPIKE,
United States Attorney
S. P. MURMAN,
Assistant United States Attorney
Attorneys and Proctors for and on behalf of Respondent Warren H. Pillsbury.

[Endorsed]: Filed Mar. 25, 1935. [142]

[Title of Court and Cause.]

RESPONDENT CAPTAIN FRANK WEIDEMANN'S ASSIGNMENTS OF ERROR.

Comes now Captain Frank Weidemann, one of the appellants herein, and pursuant to his Notice of Appeal from the Decree, and each and every part thereof, filed in favor of libelant herein, hereby assigns error to be reviewed on appeal by the Circuit Court of Appeal for the Ninth Circuit, to-wit:

1. The District Court erred in denying respondents' motion to vacate order for judgment for libelant and enter decree for respondents.

2. The District Court erred in that it refused to approve and sign the amended and additional findings of fact and conclusions of law proposed by respondents, and file the same as its findings of fact and conclusions of law.

3. The District Court erred in finding and holding that Respondent Weidemann at the time of the injury for which compensation was awarded by respondent Pillsbury, was the master of the "Star of Shetland", whose owner was one [143] Arthur E. Small.

4. The District Court erred in finding and holding that respondent Pillsbury with the exercise of reasonable care, should have known, prior to the entry of the compensation order and award of February 1, 1930, that respondent Weidemann was not an employe of libelant and that the injury alleged by him was not within the purview of the Long-

shoremen's and Harbor Workers' Compensation Act.

5. The District Court erred in finding and holding that the order of February 1, 1930, did not put libelant on notice that it was not a final award in the proceedings pending before respondent Pillsbury or that the libelant might be liable to the respondent Weidemann in a greater sum than that awarded in said order.

6. The District Court erred in finding and holding that the fact that the libelant did not, within thirty days after said award of February 1, 1930, against it in the sum of $264.28, seek a review thereof in said court, does not preclude libelant in said court for a review of respondent Pillsbury's order of October 16, 1931, refusing to set aside his second and subsequent award in the sum of $2,531.00 entered against libelant on September 16, 1931.

7. The District Court erred in finding and holding that libelant upon receipt of the order of February 1, 1930, paid respondent Weidemann the sum of $264.28 awarded therein and arrested the payment of the $25.00 weekly temporary disability payments therein awarded as it had a right to do by employing respondent Weidemann on January 17, 1930, at an average weekly wage equal to that he received before the injury and he, therefore, suffered no loss in his wage earning capacity after January 7, 1930, to and including the period [144] set out in respondent Pillsbury's second order made September 16, 1931, awarding respondent Weidemann the sum of $2,531.00.

8. The District Court erred in finding and holding that the libelant properly petitioned respondent Pillsbury on October 16, 1931, for an order suspending said compensation order and award of September 16, 1931, and made adequate showing thereon, and that respondent Pillsbury's order denying said petition on October 16, 1931, was an abuse of administrative and judicial discretion, reviewable by this court under section 21 of the Longshoremen's and Harbor Workers' Compensation Act.

9. The District Court erred in finding and holding that this proceeding having been brought within thirty days of respondent Pillsbury's order of October 16, 1931, is within the time prescribed by Section 21, of the Longshoremen's and Harbor Workers' Compensation Act and that the validity of that order is properly in said court for review and for determination of the rights of the parties thereto.

10. The District Court erred in holding that the order of respondent, Pillsbury, denying libelant's petition for rehearing and for setting aside previous compensation orders in case number 238-15, Claim No. 237, pending before the United States Employes Compensation Commission, Thirteenth Compensation District, in which Captain Frank Weidemann is Claimant and Alaska Packers Association, Libelant, herein, is the Employer, is not in accordance with law.

11. The District Court erred in not finding as proposed in respondents' amended and additional findings of fact and conclusions of law that the first

compensation order of respondent Pillsbury was entered on February 1, 1930, duly establishing the jurisdictional facts and finding that respondent Weidemann suffered temporary total disability as the result [145] of injury to his right wrist, and further ordering that libelant pay to respondent Weidemann the sum of $264.28, to and including January 27, 1930, less such payments theretofore made on account of said compensation, and a further sum of $25.00 per week thereafter until further order of respondent Pillsbury, and that no proceeding pursuant to section 21b of the Longshoremen's and Harbor Workers' Act was filed within thirty days of said award by libelant and said order became final on March 3, 1931.

12. The District Court erred in not finding, as proposed in respondents' amended and additional findings of fact and conclusions of law that a second order of respondent Pillsbury was entered on September 16, 1931, finding respondent Weidemann to be permanently partially disabled due to the injury to his right wrist and modifying his first compensation order and award of February 1, 1930, to order libelant to pay to respondent Weidemann the sum of $1,025.00 as unpaid accrued compensation due as of August 28, 1931, and a further sum of $25.00 a week thereafter for 60.64 weeks, payable each two weeks and that no proceeding pursuant to Section 21b of the Longshoremen's and Harbor Workers' Compensation Act was filed within thirty days of said award by libelant, and said order became final on October 16, 1931.

13. The District Court erred in not finding, as proposed in respondents' amended and additional findings of fact and conclusions of law that a third order of respondent Pillsbury was entered on October 16, 1931, denying libelant's petition for rehearing and reopening the supplemental and modifying compensation order entered September 16, 1931, and that no proceeding pursuant to Section 21b of the Longshoremen's and Harbor Workers' Compensation Act was filed within thirty days of said award by libelant and said order became [146] final on November 15, 1931.

14. That the District Court erred in not finding, as proposed in respondents' amended and additional findings of fact and conclusions of law that the proceeding herein was filed November 16, 1931, after thirty days had elapsed since the third order of respondent Pillsbury was entered on October 16, 1931, denying libelant's petition for rehearing and reopening the supplemental and modifying compensation order entered September 16, 1931.

15. The District Court erred in treating the order of respondent Pillsbury, of October 16, 1931, denying libelant's petition for a rehearing of the compensation order of September 16, 1931, as itself a compensation order reviewable by the District Court.

16. The District Court erred in not finding as proposed in respondents' amended and additional findings of fact and conclusions of law that libelant had due and proper notice of the orders of respondent Pillsbury entered on the dates respectively as

hereinbefore set forth under assignments numbers 9, 10, 11, 12, 13 and 14.

17. The District Court erred in entering a decree for libelant setting aside the order of respondent, Warren H. Pillsbury, Deputy Commissioner, Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, denying libelant's petition for rehearing and for setting aside previous compensation orders in case No. 238-15, Claim No. 237, pending before the United States Employes Compensation Commission, Thirteenth Compensation District, in which Captain Frank Weidemann is claimant and Alaska Packers Association, a corporation, is the libelant.

18. The District Court erred in entering a decree [147] for libelant setting aside Respondent Pillsbury's order of September 16, 1931, and October 16, 1931, and enjoining respondent Pillsbury from enforcing his order and award of September 16, 1931.

19. The District Court erred in entering a decree that respondent Frank Weidemann take nothing from libelant on account of injuries alleged in case No. 238-15, Claim No. 237, pending before the United States Employes Compensation Commission, Thirteenth Compensation District, or by reason of any orders therein entered.

20. That the District Court erred in entering the decree that libelant have judgment against respondents for its costs of suit in its behalf expended.

Dated this 17th day of April, 1935.

RESLEURE, VIVELL & PINCKNEY

Proctors for and on behalf of Respondent Captain Frank Weidemann.

[Endorsed]: Filed Apr 22 1935. [148]

[Title of Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS.

It appearing to the above-entitled court that Respondent Warren H. Pillsbury, having served and filed his notice of appeal in the above-entitled matter; and

Good cause now appearing therefor;

IT IS ORDERED that all original exhibits introduced in evidence in the above-entitled cause be and the same are hereby ordered transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as original exhibits, with the apostles on appeal in said cause.

Dated this 25th day of March, 1935.

HAROLD LOUDERBACK

United States District Judge.

[Endorsed]: Filed Mar 25 1935 [149]

STIPULATION CONSOLIDATING APOSTLES ON APPEAL.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that

apostles on appeal requested in the above entitled matter on behalf of each respondent, be and the same are hereby consolidated as respondents' apostles on appeal to include the original exhibits introduced in evidence in said matter and transferred, by virtue of that certain order of the United States District Court, dated and filed on the 25th day of March, 1935, to the United States Circuit Court of Appeals for the Ninth Circuit, with the apostles on appeal of respondent Pillsbury.

IT IS FURTHER STIPULATED AND AGREED that respondent Frank Weidemann may file supplemental apostles herein if the same are deemed necessary, in accordance with that certain stipulation heretofore approved by the United States District Court and filed on the 25th day of March, 1935.

H. H. McPIKE
United States Attorney.

S. P. MURMAN
Assistant United States Attorney.
Attorneys and Proctors for and on behalf of respondent Warren H. Pillsbury.

RESLEURE, VIVELL & PINCKNEY
Attorneys and Proctors for and on behalf of respondent Frank Weidemann.

It is so ordered:

HAROLD LOUDERBACK
United States District Judge.

[Endorsed]: Filed May 9 1935. [150]

BOND FOR COSTS ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, Frank Weidemann as principal, and St. Paul Mercury Indemnity Company, a corporation authorized to transact a surety business within the Northern District of California, as surety, are held and firmly bound unto the Alaska Packers Association, a corporation, and its duly authorized representatives in the sum of two hundred fifty dollars ($250.00) lawful money of the United States, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Signed, sealed and dated this 6th day of April, 1935, at San Francisco, California.

WHEREAS, Frank Weidemann is appealing to the United States Circuit Court of Appeals for the Ninth Circuit from that certain decree in the above-entitled cause made and entered in the above-entitled court on the 27th day of December, 1934, in favor of Alaska Packers Association, a corporation, as libelants, and against Warren H. Pillsbury, Deputy Commissioner Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and Frank Weidemann, as respondents;

NOW, THEREFORE, the condition of this obligation is such that if the above-named principal herein as an appellant in the above-entitled cause shall prosecute said appeal herein from said decree

with effect and pay all costs which may be awarded against it as such appellant if said appeal is not sustained, then this obligation shall be void; otherwise the same shall continue in full force and effect.

AND, FURTHER, it is expressly understood and agreed that in case of a breach of any condition of the above obligation [151] the Court in the above-entitled matter, upon notice to the St. Paul Mercury-Indemnity Company of not less than ten (10) days, may proceed summarily in the action or suit in which the above obligation was given to ascertain the amount which said surety is bound to pay on account of such breach and render judgment against it and award execution therefor.

FRANK WEIDEMANN
SAINT PAUL-MERCURY INDEMNITY COMPANY OF SAINT PAUL
[Seal] By FRANK J. CHAMBERLIN
Attorney in Fact.

State of California,
City and County of San Francisco.—ss.

On this 6th day of April in the year One Thousand Nine Hundred and Thirty-five before me, Kathryn E. Stone, a Notary Public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared

FRANK WEIDEMANN

known to me to be the person described in, whose name is subscribed to, and who executed the within

and annexed instrument and he acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] KATHRYN E. STONE

Notary Public in and for the City and County of San Francisco, State of California. My Commission expires March 1, 1937. Telephone SUtter 6955. [152]

Acknowledgment of Attorney-in-Fact.

State of California,
City and County of San Francisco.

On this 6th day of April, 1935, before me, a Notary Public, within and for the said County and State, personally appeared Frank J. Chamberlin, to me personally known, who being duly sworn, upon oath did say that he is the Agent and Attorney-in-Fact of and for the Saint Paul-Mercury Indemnity Company of Saint Paul, Saint Paul, Minnesota, a corporation, created, organized and existing under and by virtue of the laws of the State of Delaware, that the corporate seal affixed to the foregoing within instrument is the seal of the said Company; that the seal was affixed and the said instrument was executed by the authority of its Board of Directors; and he did also acknowledge

that he executed the said instrument as the free act and deed of said Company.

[Seal] MARGARET KEENE WHITMORE
Notary Public, in and for the City and County of San Francisco, State of California. My commission expires Nov. 22, 1936.

The form of bond and the sufficiency of the surety is hereby approved this 6th day of April, 1935.

HAROLD LOUDERBACK
District Judge.

The foregoing cost bond is hereby approved as to amount and form, and notice of the filing of the same together with the notice of the name and address of surety on said bond is hereby waived this 6th day of April, 1935, without prejudice on libelants proposed motion to dismiss purported appeal.

PILLSBURY, MADISON & SUTRO
Proctors for Libelant.

[Endorsed]: Filed Apr 6, 1935. [153]

[Title of Court and Cause.]

RESPONDENT PILLSBURY'S PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the above-entitled court:

We hereby request that you prepare, certify and file apostles on appeal in the above-entitled cause, to contain the following:

1. Libel of Petitioner (originally filed as complainant's complaint in equity).

2. Notice of motion to transfer cause to admiralty.

3. Stipulation allowing Respondent Pillsbury to file unverified general denial.

4. Unverified general denial filed on brief of Respondent Pillsbury by United States Attorney.

5. Order that motion to transfer cause to admiralty be granted (entered January 4, 1934).

6. All testimony taken and proceedings of trial.

7. Order that decree be entered in favor of Libelant upon filing of findings of fact (entered July 11, 1934).

8. Amended and additional findings of fact and conclusions of law lodged by Respondents. [154]

9. Notice of motion to vacate order for decree in favor of Libelant and for a decree for Respondents.

10. Order that motion to vacate order for decree in favor of Libelant and for a decree for Respondents be denied (entered December 14, 1934).

11. Findings of fact and conclusions of law.

12. Decree (entered December 27, 1934).

13. Notice of appeal of Respondent Pillsbury.

14. Stipulation re apostles on appeal.

15. All original exhibits.

16. Order transmitting original exhibits.

17. Assignments of error of Respondent Pillsbury.

18. This praecipe.

In the preparation of said apostles you are requested to omit all captions (except name of the

paper), acceptances of service, verifications and filing endorsements, excepting the date thereof.

H. H. McPIKE
United States Attorney
S. P. MURMAN
Assistant United States Attorney
Attorneys and Proctors for and on behalf of Respondent Warren H. Pillsbury.

[Endorsed]: Filed Mar. 25, 1935. [155]

[Title of Court and Cause.]

STIPULATION RE PRAECIPE FOR APOSTLES ON APPEAL

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that all pleadings, testimony, exhibits and other documents in the above case, other than those specifically specified in the foregoing praecipe, may be omitted from the apostles herein with the right reserved to any of the parties to file supplemental apostles herein if deemed necessary.

H. H. McPIKE
United States Attorney
By S. P. MURMAN
Asst. United States Attorney
Attorneys and Proctors for and on behalf of Respondent Warren H. Pillsbury.
PILLSBURY, MADISON & SUTRO
Proctors and Attorneys for Libelant.

It is so ordered:

HAROLD LOUDERBACK
United States District Judge.

[Endorsed]: Filed Mar 25 1935. [156]

[Title of Court and Cause.]

RESPONDENT WEIDEMANN'S PRAECIPE FOR ADDITIONAL MATTERS TO BE INCLUDED IN APOSTLES ON APPEAL.

Please include as part of the Apostles on Appeal to be prepared, certified and filed by you herein pursuant to the praecipe of Respondent Pillsbury, and in addition to the matters therein requested to be contained, the following:

1. Answer of Respondent Weidemann.
2. Notice of Appeal and Appeal of Respondent Weidemann.
3. Bond on Appeal of Respondent Weidemann.
4. Assignments of Error of Respondent Weidemann.
5. Stipulation consolidating Apostles on Appeal.
6. This Praecipe.

This request is made pursuant to stipulation between Respondent Weidemann and Respondent Pillsbury as to the preparation and consolidation of Apostles on Appeal.

In including the above matters please omit all captions (except name of paper), acceptances of service, verifications, and filing endorsements (excepting the date thereof). [157]

Dated: April 19, 1935.

RESLEURE, VIVELL & PINCKNEY
Proctors for Respondent Weidemann.

[Endorsed]: Filed Apr. 22, 1935 [158]

In the Southern Division of the United States District Court, Northern District of California.

CERTIFICATE OF CLERK TO APOSTLES ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 158 pages, numbered from 1 to 158, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Alaska Packers Association, a corp., Libelant, vs. Warren H. Pillsbury, Deputy Commissioner, etc., et al., Respondents, No. 21703-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing apostles on appeal is the sum of Sixty Three Dollars ($63.00) and that the said amount has not been paid to me, except the sum of Four Dollars and Twenty Cents ($4.20) which was paid by the proctors for Appellant, Weidemann.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 22nd day of June, A. D., 1935.

[Seal] WALTER B. MALING, Clerk.
By C. M. TAYLOR
Deputy Clerk. [159]

[Endorsed]: 7853. United States Circuit Court of Appeals for the Ninth Circuit. Warren H. Pillsbury, as Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, Appellant, vs. Alaska Packers Association, a Corporation, Appellee. and Frank Weidemann, Appellant, vs. Alaska Packers Association, a Corporation, Appellee. Apostles on Appeals. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 22, 1935.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7853

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WARREN H. PILLSBURY, etc., et al.,
Appellants,

vs.

ALASKA PACKERS ASSN., a corporation,
Appellee.

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

[Title of Court and Cause.]

NOTICE OF AND MOTION TO DISMISS APPEALS.

MOTION TO DISMISS APPEALS.

Comes now the above designated appellee, Alaska Packers Association, a corporation, and moves the above entitled court to dismiss the appeals, and each of them, purported to have been taken by appellants above named from the decree entered by the United States District Court for the Northern District of California, Southern Division, In Admiralty, the Honorable Harold Louderback, Judge and therein numbered 21,703-L, wherein appellee is libelant and appellants resopndents, upon the following grounds:

(1) As to each appeal, that no petition for allowance of an appeal was ever made to, and no appeal was allowed by, any judge or court authorized to allow appeals;

(2) As to the appeal of appellant Weidemann:

(a) That no assignments of error were filed as provided by Rule 11 of this court;

(b) That the appeal was not taken within the period prescribed by statute;

(3) As to the appeal of appellant Pillsbury, that the decree is a joint decree, not severable or subject to summons and severance, and that appellant Pillsbury, having no interest in the subject matter, cannot maintain an appeal on his own behalf alone.

NOTICE OF MOTION TO DISMISS APPEALS.

To the appellants above named, and to the United States District Attorney at San Francisco, and Messrs. Resleure, Vivell & Pinckney, Proctors for appellants, respectively:

You and each of you will please take notice that the foregoing motion to dismiss appeals will be heard on Monday, May 6, 1935, at 10:30 o'clock A. M., or as soon thereafter as counsel may be heard, at the courtroom of the above entitled court, Post Office Building, Seventh and Mission Streets, San Francisco, California.

The motion will be heard on the attached stipulation relating to the record and on the accompanying memorandum of points and authorities on appellee's motion to dismiss the appeals, and upon the records, pleadings and files herein.

Dated, San Francisco,
April 22, 1935.

F. D. MADISON,
FRANCIS GILL,
Proctors for Appellee.

[Endorsed]: Filed Apr. 23, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, May 6, 1935.

Before: WILBUR, GARRECHT and MATHEWS, Circuit Judges.

ORDER SUBMITTING MOTION TO DISMISS APPEALS.

ORDERED motion to dismiss appeals argued by Mr. Francis Gill, proctor for appellee, and by Mr. S. P. Murman, Assistant U. S. Attorney, proctor for appellant Pillsbury, and by Mr. James Resleure, proctor for appellant Weidemann, and submitted to the court for consideration and decision, with leave to respective proctors to file further briefs 5x5, and with leave to Amici Curiae to file briefs within 5 days.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, July 1, 1935.

Before: GARRECHT, DENMAN and MATHEWS, Circuit Judges.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES, OR ORDERS.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court

in each of the following causes be forthwith filed by the clerk, and that a judgment, decree or order be filed in each of said causes and recorded in the minutes of this court in accordance with the opinion rendered:

* * * No. 7853. Pillsbury, etc., et al. v. Alaska Packers Association, a corporation. * * *

[Title of Court and Cause.]

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

ON MOTION TO DISMISS APPEALS.

Before: WILBUR, GARRECHT and MATHEWS, Circuit Judges.

MATHEWS, Circuit Judge:

Appellee moves to dismiss appeals separately taken by appellants Pillsbury and Weidemann from a final decree in admiralty. Grounds of the motion are (1) that there was no petition for or allowance of either appeal; (2) that appellant Weidemann's assignment of errors was not filed at or prior to the time of taking his appeal; (3) that Weidemann's appeal was not taken in time; and (4) that the decree appealed from is joint, not severable or subject to summons and severance, and that, therefore, if Weidemann's appeal is dismissed, Pillsbury's must also be dismissed.

Final decrees in admiralty have been appealable to this Court since its establishment in 1891. Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Judicial Code, Sec. 128, as amended February 13, 1925, c. 229, 43 Stat. 936, 28 U. S. C. 225. Now interlocutory decrees in admiralty are likewise appealable. Judicial Code, Sec. 129, as amended April 3, 1926, c. 102, 44 Stat. 233, 28 U. S. C. 227.

The Act of March 3, 1891, did not prescribe the form or manner in which appeals to this Court should be taken. Whether this should be by petition for and allowance of the appeal, or simply by giving notice thereof, was not specified. These and other details of appellate procedure was left for the Court itself to regulate. By Sec. 2 of the Act (26 Stat. 827) the court was expressly empowered to "prescribe the form * * * of writs and other process and procedure as may be conformable to the exercise of its jurisdiction," and to "establish all rules and regulations for the conduct of the business of the Court within its jurisdiction". The Court still has that power. Judicial Code, Sec. 122, 36 Stat. 1132, 28 U. S. C. 219. This Court, in the exercise of the power thus conferred, did on June 22, 1891, establish General Rules for the conduct of its business, one of which was Rule 11 (90 F. cxlvi), reading as follows:

> "The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately

and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. * * *"

On October 28, 1924, General Rule 11 was amended by adding a provision relative to the issuance of citations. In the general revision of this Court's rules on June 27, 1928, Rule 11 was further amended by omitting all references to writs of error. As thus amended, it read, and reads now, as follows:

"The appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No appeal shall be allowed until such assignment of errors shall have been filed. Citation shall issue immediately upon the allowance of the appeal. * * *"

Under General Rule 11, prior to May 21, 1900, it was necessary in admiralty, as in other cases, to file a petition for appeal and, with it, an assignment of errors, and to obtain an allowance of the appeal. This was not a statutory requirement, but was one which the Court itself had prescribed, and could at any time alter or abolish. The requirement was abolished on May 21, 1900, when this Court adopted its Admiralty Rules (100 F. iii), Rule 1 of which provided:

"An appeal to the Circuit Court of Appeals shall be taken by filing in the office of the Clerk

> of the District Court, and serving on the proctor of the adverse party, a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of * * *"

In the general revision of June 27, 1928, Admiralty Rule 1 was amended and readopted in its present form, as follows:

> "An appeal from an interlocutory or final decree to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of. * * *"

Shortly after the adoption of its Admiralty Rules, this Court had before it the case of Kenney v. Louie, No. 939 (not reported), in which an appeal from a final decree in admiralty "was taken by the filing and service of a notice of appeal on the 19th day of November, 1902, * * * as provided by Admiralty Rule 1 of this court." The assignment of errors was not filed until nine days later. The appellee raised no question as to the manner or method of taking the appeal, but moved to dismiss it on the ground, among others, that "said appeal was taken and allowed before appellants made or filed in said cause any assignment of errors as pro-

vided in General Rule 11." The motion was denied, without opinion, on May 6, 1903, following which there was appended to Admiralty Rule 1 a note (121 F. iii), which was preserved in the revision of 1928, and is recognized as an integral part of the rule. Also, there was and is appended to General Rule 11 a note admonishing the reader to "see note to Admiralty Rule 1." The note to Admiralty Rule 1 reads as follows:

> "This rule so far modifies Rule 11 of the General Rules that a petition for an appeal and the allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal. The assignment of errors must, however, be sent up to the appellate court with the apostles, as required in Rule 4 of the Admiralty Rules. (Kenney v. Louie, No. 939. Motion to dismiss appeal denied May 6, 1903.)"

The appeals in this case were taken by filing and serving notices of appeal, as provided in Admiralty Rule 1. Appellee concedes that they were taken in conformity with Rule 1, but contends that Rule 1 was abrogated and rendered inoperative by Sec. 8(c) of the Act of February 13, 1925, c. 229, 43 Stat. 940, 28 U. S. C. 230, which provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

This section superseded a portion of Sec. 11 of the Act of March 3, 1891, c. 517, 26 Stat. 829, which read as follows:

> "No appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: Provided, however, That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals."

The purpose and, we think, the only purpose of Sec. 8(c) of the Act of February 13, 1925, was to shorten from six months to three months the time within which appeals might be taken to the Circuit Courts of Appeals. Appellee argues that Congress also intended by this section to abolish appeals as a matter of right, and to make all appeals discretionary, so that thereafter appeals could not be "taken", but must be "applied for" and, if deemed proper, "allowed".

That Congress had no such intention is evidenced by the Act itself. Section 1 of the Act amends Sec. 129 of the Judicial Code (43 Stat. 937, 28 U. S. C. 227) to provide that "an appeal may be taken" from an interlocutory order or decree granting, continuing, modifying, refusing or dissolving an injunction or appointing a receiver. Section 1 of the

Act also amends Sec. 238 of the Judicial Code (43 Stat. 938, 28 U. S. C. 380) by adding thereto the provision that "an appeal may be taken" direct to the Supreme Court from an order granting or denying an interlocutory injunction in a three-judge case. Section 10 of the Act (43 Stat. 941, 28 U. S. C. 861) provides that no court having power to review a judgment or decree shall dismiss a writ of error solely because "an appeal should have been taken." Thus, instead of abolishing the right to "take" appeals, the Act itself recognizes the right and provides for its exercise.

That Congress did not have the intention attributed to it by appellee is further evidenced by its subsequent enactments. The Act of April 3, 1926, c. 102, 44 Stat. 233, 28 U. S. C. 227, provides that "in all cases where an appeal from a final decree in admiralty to the Circuit Court of Appeals is allowed, an appeal may also be taken to said court from an interlocutory decree in admiralty, determining the rights and liabilities of the parties * * *" In using the word "also" Congress recognizes that the right to "take" an appeal from a final decree in admiralty still exists.

The Act of February 28, 1927, c. 228, 44 Stat. 1261, 28 U. S. C. 227a, provides that when, in a patent infringement suit, a decree is rendered which is final except for the ordering of an accounting, "an appeal may be taken from such decree to the Circuit Court of Appeals: Provided, that such appeal be taken within thirty days", etc. Here again

Congress recognizes that the right to "take" an appeal has not been abolished.

Section 2 of the Act of January 31, 1928, c. 14, 45 Stat. 54, provided that "in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party * * * a written notice", etc. This was a clear recognition by Congress that an appeal might still be "taken as of right" notwithstanding the Act of February 13, 1925. An appeal from a final decree in admiralty is one which may be "taken as of right." Hume v. Franz (C. C. A. 9), 150 F. 502.

Section 2 of the Act of January 31, 1928, was superseded by Sec. 2 of the Act of April 26, 1928, c. 440, 45 Stat. 466, 28 U. S. C. 861b. The latter section deals only with those appeals which by Sec. 1 of the Act of January 31, 1928, were substituted for writs of error. Territory of Hawaii v. Gay (C. C. A. 9), 52 F. (2d) 356. It prescribes no procedure for equity or admiralty appeals, but leaves them subject to regulation by the Court, the result being that, in this Circuit, equity appeals have since been governed by General Rule 11 and admiralty appeals by Admiralty Rule 1, as they were prior to January 31, 1928.

This Court was not unaware of the Act of February 13, 1925, when, on June 27, 1928, it revised its rules and readopted Admiralty Rule 1, as well as General Rule 11. The revision was made in the light of and in conformity with the Act. Then, as now, this Court saw nothing in the Act to warrant the supposition that Congress intended thereby to

abrogate Admiralty Rule 1 by abolishing appeals as a matter of right and making all appeals discretionary, thus rendering it impossible in any case to "take" an appeal. We hold that Admiralty Rule 1 is still in effect, and that the appeals in this case were properly taken.

Appellant Weidemann's failure to file his assignment of errors at or prior to the time of taking his appeal constitutes no ground for dismissal. His assignment of errors was subsequently filed and was sent up to this Court with the apostles. That was sufficient. Admiralty Rule 1 and footnote, supra; Admiralty Rule 4, subdivision 1(k); Kenney v. Louie, supra.

There is no merit in appellee's contention that Weidemann's appeal was not taken in time. The decree appealed from was a final decree. It was entered on December 27, 1934. Weidemann had the right to appeal therefrom at any time "within three months after the entry" of the decree. Act of February 13, 1925, c. 229, Sec. 8(c), 43 Stat. 940, 28 U. S. C. 230. The day of the entry of the decree must be excluded in computing the time for taking the appeal. Smith v. Gale, 137 U. S. 577; United States v. Beaman, 61 F. (2d) 493. Weidemann's appeal was taken on March 27, 1935, which was within three months after entry of the decree and was, therefore, in time.

Finding no ground for the dismissal of Weidemann's appeal, we have no occasion to consider what

effect, if any, such dismissal might have had on Pillsbury's appeal.

Motion denied.

[Endorsed]: Opinion. Filed Jul. 1, 1935. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, July 1, 1935.

Before: GARRECHT, DENMAN and MATHEWS, Circuit Judges.

ORDER DENYING MOTION TO DISMISS.

Upon consideration of the motion of appellee to dismiss the appeals herein, and of the opposition of appellants thereto, and of the briefs filed by respective parties, and brief filed by Amici Curiae, and pursuant to the opinion this day rendered and filed, IT IS ORDERED that the said motion to dismiss appeals herein be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Friday, September 6, 1935.

Before: WILBUR, GARRECHT, DENMAN and MATHEWS, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING OF MOTION TO DISMISS.

Upon consideration thereof, and by direction of the court, IT IS ORDERED that petition of appellee, filed July 23, 1935, for a rehearing of motion to dismiss appeals, be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, February 11, 1936.

Before: WILBUR, GARRECHT and HANEY, Circuit Judges.

ORDER OF SUBMISSION.

ORDERED appeals in above cause argued by Mr. S. P. Murman, Assistant U. S. Attorney, proctor for appellant Pillsbury, and by Mr. Eugene R. Elerding, proctor for appellant Weidemann, and by Mr. Francis Gill, proctor for appellee Alaska Packers Association, and submitted to the court for consideration and decision, with leave to file further briefs 5x5.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, September 21, 1936.

Before: WILBUR, GARRECHT and DENMAN, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILIG AND RECORDING OF DECREE.

By direction of the court, ORDERED that the opinion and dissenting opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Court and Cause.]

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Before: WILBUR, GARRECHT and HANEY, Circuit Judges.

GARRECHT, Circuit Judge:

OPINION.

On November 15, 1929, the appellant Weidemann fell and injured his right arm and hand while on

board the Metha Nelson, a sailing vessel owned and operated by the appellee, and lying in the harbor of Oakland, California. Proper notice having been given, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A., §901, et seq.), a hearing was held on January 27, 1930, before the appellant Pillsbury, to ascertain the appellant Weidemann's right to compensation. The appellee was not represented at the hearing, having previously written to the appellant Pillsbury that it desired him to "pass on the responsibility of this particular case."

On February 1, 1930, Pillsbury filed his award, as follows:

1. That Weidemann was employed by the appellee when injured.

2. That the injury occurred on navigable waters of the United States.

3. That Weidemann suffered temporary total disability, entitling him to $25 a week as compensation, "until further order of the Deputy Commissioner".

The award also ordered the appellee to pay Weidemann $264.28 "to and including January 27, 1930, less all payments heretofore made on said account."

On August 12, 1931, the appellee advised Pillsbury that Weidemann had fully recovered from his injury and requested that further liability under the award be terminated. Weidemann resisted the appellee's request. Accordingly, after proper notice,

on August 28, 1931, the matter of terminating the liability was heard before Pillsbury, who, on September 16, 1931, ruled as follows:

1. That Weidemann's right arm became permanently disabled on November 15, 1930, the first anniversary of the accident.

2. That there was $1,025 unpaid accrued compensation due Weidemann from November 15, 1930, to August 28, 1931, which the Deputy Commissioner ordered the appellee to pay, in addition to $25 a week for 60.64 weeks thereafter, beginning August 28, 1931, the date of the last hearing.

It is admitted that the appellee received a copy of each of the two foregoing orders of the Deputy Commissioner.

Within thirty days thereafter, the appellee petitioned Pillsbury to set aside his order of September 16, 1931, and for a rehearing, claiming fraud on the part of Weidemann as to the question of employment, and lack of notice in the order of February 1, 1930, of liability for any further compensation, in addition to the first award.

On October 16, 1931, on the ground that the appellee had failed to establish fraud, and on the further ground that the jurisdictional facts adjudicated by the award of February 1, 1930, had established the appellee's liability for the accrued compensation awarded on September 16, 1931, Pillsbury denied the appellee's petition for a rehearing. On the ground that no fraud on Weidemann's part had been shown, the court below sustained a motion for

nonsuit in an equity action, No. 3056-L, arising out of the same facts, which was brought by the appellee, but which is not now before this court.

On November 16, 1931, the appellee filed the present action. A trial de novo was held to review the jurisdictional fact of Weidemann's employment by the appellee. Thereafter, the court below entered a decree setting aside Pillsbury's orders of September 16, 1931, and October 16, 1931, enjoining Pillsbury from enforcing the compensation award, and ordering that Weidemann take nothing from the appellee on account of the injury or by reason of any orders theretofore entered by Pillsbury.

While the present action originally was filed as a suit in equity, by stipulation the cause was transferred to the admiralty docket, to be tried simultaneously with No. 3056-L, in equity, supra.

Three assignments of error filed by Pillsbury present a single question; namely, Did the court below have jurisdiction to entertain this action, under Section 21(a) and (b) of the Longshoremen's and Harbor Workers' Compensation Act of 1927?

The appellant Weidemann also asserts as error the lower court's finding as to non-employment, which was as follows:

> "Respondent Pillsbury, with the exercise of reasonable care, should have known prior to entry of the compensation order and award of February 1, 1930, that respondent Weidemann was not an employee of libelant [appellee], and that the injury alleged by him was not within

the purview of the Longshoremen's and Harbor Workers' Compensation Act. . . ."

Section 21(a) and (b) of the act in question reads in part as follows:

"(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

"(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituting in the Federal district court for the judicial district in which the injury occurred. . . ." (44 Stat. Pt. 2, 1436.)

Section 22, as it stood at the time the present suit was brought, was as follows:

"Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time during the term of an award and after the compensation order in respect of such award has become final, review such order in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, in-

crease, or decrease such compensation. Such new order shall not affect any compensation paid under authority of the prior order."

In the instant case, Pillsbury's first order, of February 1, 1930, awarded Weidemann $25 a week from January 27, 1930, "until further order of the Deputy Commissioner".

Thus, both by the provisions of the statute and the terms of the order itself, the Deputy Commissioner retained jurisdiction over Weidemann's claim for compensation. But that jurisdiction was limited by Section 22 to be exercised only in the event that there was "a change in conditions".

In other words, the supplemental order of September 16, 1931, did not and could not review the jurisdictional question of employment; for, obviously, that question is not susceptible to any "change in conditions". The claimant is either in the employ of the shipowner at the time of the injury, or he is not employed. Nothing that occurs afterward can alter the status that exists at the time of the accident.

The expression "change in conditions" refers to a change in the physical condition of the employee. Atlantic Coast Shipping Co. v. Golubiewski, 9 F. Supp. 315, 317.

In its libel, the appellee charges that Weidemann "fraudulently misrepresented" the jurisdictional facts to Pillsbury, and that "a fraud had been perpetrated against" the appellee. The court below,

however, expressed itself unequivocally on the subject of fraud:

> "I don't see anything in his [Weidemann's] conduct which indicates to me he was trying to deceive or defraud or get something that he was not entitled to. I think he honestly believed and believes now, probably, that he was employed at that time. Consequently, there is no element of fraud that I can see."

Indeed, the testimony of Austin K. Tichenor, vice-president and general manager of the appellee, conclusively shows that he did not rely upon Weidemann's statements as to his status, but upon the statements of Roy E. Astrup, superintendent of the appellee's shipyards at Alameda, California. In a series of searching questions, the District Judge himself elicited this information from Tichenor:

> "Q. In other words, you didn't go out trying to round up evidence?
>
> "A. No.
>
> "Q. It was more a matter of sympathy?
>
> "A. I knew both of these men for years.
>
> "Q. But as a matter of fact, even though his statements might be false they didn't affect you in making the representation to your company?
>
> "A. No, not at that time.
>
> "Q. You relied upon your subordinate, Captain Astrup, did you?
>
> "A. I did."

In its libel, the appellee averred that it "could not, with reasonable diligence, have discovered" the evidence surrounding the circumstances of Weidemann's injury. In its brief, the appellee stresses the "open spirit of cooperation with the Deputy Commissioner" in which the "appellee was originally misled into consenting to an award of $264.28". It seems strange, however, that an employer would require twenty-three months to ascertain whether or not a certain individual was in its employ on a given date. Such tardiness strongly suggests lack of due diligence—particularly in view of the fact that Tichenor admits he did not "go out trying to round up evidence".

Another probable reason for the shipowner's inaction after Pillsbury's first order was that the lump-sum award was small. This is clearly indicated in the appellee's brief:

> "Upon discovery of facts that appellee was not liable for the injury to Weidemann's hand and wrist, it was the Deputy Commissioner's duty to absolve appellee of further liability.
>
> "Instead, he held that appellee had consented to a finding of employment by not seeking injunctive redress within thirty days of February 1, 1930, *when only $264.28 was involved,* and that he therefore had no authority to relieve appellee of the burden of his supplementary award made twenty months later *for ten times that amount.*" [Italics our own.]

Again, at the trial in the court below, one of the appellee's proctors even more clearly indicated that the small size of the award was the controlling reason for the appellee's failure to contest the Deputy Commissioner's first order:

> "Q. In other words, if you take your construction of the Act, the question of employment was finally settled by the first finding?
>
> "A. Yes.
>
> "Q. When that became final you could go on then and build up on that indefinitely the judgments against the Alaska Packers Association, and prevent us from coming back and showing that he was not our employee, *though we were unwilling to appeal the case for $264?*" [Italics our own.]

Be that as it may, it is undisputed that, despite the fact that due notice was served upon the appellee, the appellee chose not to be represented at the first hearing before the Deputy Commissioner. On the contrary, the appellee filed before Pillsbury a formal answer, admitting "that the relationship of employer and employee existed at the time of the injury." Nor was the appellee represented at the second hearing, on August 28, 1931, which culminated in the issuance of the second order, dated September 16, 1931, although due notice of such hearing was served upon the appellee.

"The whole thing", the appellee's proctor candidly states in his brief, "had been left to Pills-

bury's discretion to do the right thing between the parties."

But now that Pillsbury's "discretion" proves not to have been exercised in a manner acceptable to the appellee, the latter is complaining of the Deputy Commissioner's lack of jurisdiction.

Section 21 provides that a compensation order shall become final after thirty days, unless proceedings for its abrogation are instituted in the District Court within that time. Associated Indemnity Corporation v. Marshall (CCA 9), 71 F.(2d) 235, 236; Id. 71 F.(2d) 420. In view of that provision, and particularly under the record made out in this case, to permit the jurisdictional fact of employment to be questioned twenty months after the original compensation order, would, we think, result in frittering away the purpose of the Longshoremen's and Harbor Workers' Compensation Act.

That the purpose of the Act is to bring about "final awards and termination of litigation" after thirty days seems to have been recognized in another case by the District Judge who tried the instant suit. United Fruit Co. v. Pillsbury, 55 F.(2d) 369, 370.

Decree reversed.

WILBUR, Circuit Judge, Dissenting:

The Alaska Packers Association authorized its employee and agent Ernest Califro to ascertain the cubic capacity of one of its schooners, The Metha Nelson, and for that purpose, to procure the assist-

ance of John Lyons, if he could be found, and if not the services of Captain Klotz, or of Captain Frank E. Weidemann, to remove the hatches of the Metha Nelson. Ernest Califro could not find John Lyons, or Captain Weidemann, so he procured the services of Captain Klotz, and proceeded to measure the capacity of the schooner. While they were in the hold of the vessel, so engaged, Captain Weidemann appeared on deck, and unsolicited, attempted to descend into the hold and in doing so fell from the ladder and suffered the injuries for which he was awarded compensation by the Deputy Commissioner.

The Association, believing that Captain Weidemann had been employed by Califro, as authorized, and during the latter's absence, notified the Deputy Commissioner of the accident and requested him to make the appropriate order. This was done.

After the second award was made on September 16, 1931, the Association ascertained from Califro, that he had not employed Captain Weidemann, and within thirty days after the order, the Association brought the newly discovered evidence and situation to the attention of the Deputy Commissioner by a motion to set aside the order of September 16, 1931, on the ground of fraud and mistake in the procurement of the second order. This application was denied upon the ground that the fact of employment had been determined at the time of the first award and could not be reconsidered on the application for a new award based on new conditions.

This decision of the Deputy Commissioner, be it observed, was rendered before the decision of the Supreme Court in Crowell v. Benson, 285 U. S. 22, decided February 23, 1932, and was in accordance with the views of the Compensation Commissioner, as embodied in its rules (see dissenting opinion of Judge Brandeis in Crowell v. Benson, supra, pages 67, 68, Note 25). In that case, the Supreme Court held that the jurisdictional finding of the Deputy Commissioner was not binding on the District Court, or on the parties, in an action brought within the time limited in the Act, but that the question was to be tried de novo in the court, upon the evidence there introduced.

Until that decision of the Supreme Court, it was a matter of doubt whether there could be a trial de novo on the jurisdictional question. It was this uncertainty, no doubt, that impelled the Association to present its newly discovered evidence as to employment to the Deputy Commissioner, in the form of an application to vacate the award of September 16. Upon the denial, by the Deputy Commissioner, of its petition for a rehearing on Oct. 16, 1931, the Association on November 16, 1931, filed the present action alleging the foregoing facts and praying for an injunction against the enforcement of the supplemental order awarding Captain Weidemann, the additional sum of about $2850 for his injuries which were found to be permanent. The trial court found the facts alleged by the Association to be true and permanently enjoined the enforcement of the order.

The fact ascertained by the court that Captain Weidemann, was not an employee of the Association at the time of the injury was jurisdictional, and one to be determined by the court, by a trial de novo, Crowell v. Benson, 285 U. S. 22, if the question is seasonably brought to the attention of the court. The question then is this: Was the Association bound by the finding of employment, upon which the first award was made when the Deputy Commissioner made the second and ten times greater award for the same injury?

My associates, as I understand, hold that the failure to seek a judicial review of the jurisdictional question within thirty days after the first award, foreclosed that question at the time of the second, additional and greater award. This is in accord with the view of the dissenting members of the Supreme Court, as expressed by Justice Brandeis in Crowell v. Benson, supra, but is, I believe, opposed to the views of the majority of the court as stated by Chief Justice Hughes. The Supreme Court held, in effect, that the finding of the Deputy Commissioner as to the fact of employment, had no effect, probative or otherwise upon the trial of that question in court. The validity of the Deputy Commissioner's order the Supreme Court held depended upon the existence of a contract of employment, and his decision upon that jurisdictional question was in no way binding upon the court which was required to determine that question upon evidence presented to it, by the parties. If the Deputy Com-

missioner were a court rather than an administrative officer, his finding of jurisdiction in the first proceeding would no doubt be conclusive upon the second and supplementary application for increased compensation due to the development of conditions not foreseen or compensated for in the first instance. But the jurisdiction of the administrative officer to take any action at all is dependent upon the fact of employment and this factual question is one which Congress had no power to take away from the court (Crowell v. Benson, supra). That the first order is effective and enforcible is conceded, because not attacked within thirty days. It does not follow that the second order, which the Deputy Commissioner had no authority or jurisdiction to make, is sustainable because the previous erroneous finding of jurisdiction was consented to by the Association, and because the order was complied with in the mistaken belief that the fact was, as found by the Deputy Commissioner. The Deputy Commissioner could not acquire jurisdiction to make a further and supplementary order of relief merely by reason of his erroneous finding of the jurisdictional fact in the first instance. The law under which he acted, expressly provided that the second award like the first, was subject to attack in the courts by an application for injunctive relief, 33 U. S. C. A. Sec. 921 Subd. b, and Sec. 922, wherein, the jurisdiction of the Deputy Commissioner to make the order is a sufficient reason for granting relief. (Crowell v. Benson, supra.) Such an application, however,

must be made within the period of thirty days, after the award is filed in the office of the Deputy Commissioner. The new compensation order was made and filed September 16, 1931. This order, by the terms of the act became final and conclusive upon the expiration of thirty days, after it was filed (33 U. S. C. A. Sec. 921 (a)). The application to the court was made November 16, 1931, upon the theory that action of the Deputy Commissioner upon the motion for a rehearing, and for a vacation of the order of September 16, was a final order awarding compensation, as to which an application for an injunction might be made to the court within thirty days. The order of September 16, was the order making the award, and the application for a rehearing or a reconsideration, or a vacating of the order did not extend the time for the commencement of an action in the District Court for an injunction. That time ran from the filing of the new compensation award.

I am therefore of opinion that the application to the District Court was too late, and that the proceedings should have been dismissed for that reason. Consequently I concur in the order of reversal, but am of opinion that the trial court should be directed to dismiss the action because filed too late.

[Endorsed]: Opinion and Dissenting Opinion. Filed Sept. 21, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7853.

WARREN H. PILLSBURY, etc., et al.,
Appellants,

vs.

ALASKA PACKERS ASSN., a corporation,
Appellee.

DECREE.

APPEAL from the District Court of the United States for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in favor of appellant Frank Weidemann and against appellee.

It is further ordered, adjudged and decreed by this court that the said appellant recover against the appellee for his costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Sept. 22, 1936. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Messrs. F. D. Madison and Francis Gill, counsel for the appellee, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including December 7, 1936; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, November 17, 1936.

[Endorsed]: Filed Nov. 17, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause and Number.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred eighty-seven (287) pages, numbered from and including 1 to and including 287, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 23rd day of November A. D. 1936.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 18, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to the question of the operation of the Act of February 13, 1925, and its effect upon Rule 1 of the Admiralty Rules of the Circuit Court of Appeals for the Ninth Circuit with respect to the mode of taking an appeal.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1926

ALASKA PACKERS ASSOCIATION (a corporation),
Petitioner,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and FRANK WEIDEMANN.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit

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In the Supreme Court
OF THE
United States

October Term, 1936

No.....

Alaska Packers Association (a corporation),
Petitioner,

vs.

Warren H. Pillsbury, as Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and Frank Weidemann.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Alaska Packers Association, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review

(1) The order of the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, entered July 1, 1935, denying a motion to dismiss the separate appeals prosecuted to that court by respondents, and

(2) The final decree of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on September 22, 1936, reversing the decree of the United States District Court for the Northern District of California, Southern Division.

OPINIONS BELOW.

The District Court rendered no opinion. Its findings of fact and conclusions of law are at R. 204-208. The opinion of the Circuit Court of Appeals on the motion to dismiss (R. 260) is reported in 78 F. (2d) 587. The opinion of the Circuit Court of Appeals on final decree (R. 271) is reported in 85 F. (2d) 758.

SUMMARY STATEMENT OF THE PROCEEDINGS BELOW.

Petitioner instituted this proceeding in the United States District Court for the Northern District of California, Southern Division, to suspend and set aside an order, dated September 16, 1931, entered by respondent Pillsbury as Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, fixing and awarding compensation for permanent disability of respondent Weidemann (R. 155-157), and to suspend and set aside a further order by respondent Pillsbury, dated

October 16, 1931 (R. 206-207, 183-184), denying a petition, filed by petitioner, to set aside the order and award of September 16th.[1] The District Court filed findings and conclusions favorable to petitioner (R. 204-208), and entered its decree in accordance with the prayer of the petition. Both respondents filed "notices of appeal", but no petition for an appeal was made to, and no appeal was allowed by, the district judge or any judge or court authorized to allow appeals. The Circuit Court of Appeals denied a motion to dismiss the appeals (R. 269); and thereafter, by a divided court, reversed the decree of the District Court (R. 286).

JURISDICTION.

The order of the Circuit Court of Appeals denying the motion to dismiss was entered July 1, 1935, but final decree was not entered until September 22, 1936. The jurisdiction of this court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. The jurisdiction of this Court to review, on certiorari from the final decree, the decision of July 1, 1935, is clear. The question involved in that decision relates to the jurisdiction of the Circuit Court of Appeals to review the decree of the District Court, and is, therefore, necessarily presented and open to the consideration of this Court.

Mansfield, C. & L. M. Railway Co. v. Swan, 111 U.S. 379, 382;

Stratton v. St. Louis S. W. Ry., 282 U.S. 10, 13.

---

1. A suit in equity was also brought to set aside the award on the ground of fraud in its procurement. That suit and this proceeding in admiralty to set aside the award were tried by stipulation upon the same record. The District Court dismissed the equity suit (R. 166), on the ground that, while there was a mutual mistake of fact, there was no showing of fraud. No appeal was taken from the order dismissing the suit in equity and that case is not before this Court.

When it appears, on appeal from or certiorari to a Circuit Court of Appeals, that the latter court has acted without jurisdiction in entertaining the appeal from the District Court, the appropriate action for this Court is to reverse or vacate the decree of the Circuit Court of Appeals and remand the case with directions to dismiss the appeal to that court for want of jurisdiction.

Stratton v. St. Louis S. W. Ry., 282 U.S. 10, 18;
United States v. Fidelity & Deposit Co., 295 U.S. 719.

It was in deference to the admonitions of this Court that petitioner prosecuted the suit to final decree before seeking review of the interlocutory order denying the motion to dismiss.

Panama Railroad v. Napier Shipping Co., 66 U.S. 280, 284;
Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 91;
Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 254, 257-258.

QUESTIONS PRESENTED.

(1) Did the Circuit Court of Appeals have jurisdiction to entertain the appeals from the District Court in the absence of application for and allowance of such appeals?

(2) Where an award of compensation for temporary disability is made under the Longshoremen's and Harbor Workers' Compensation Act and the employer fails to seek a judicial review of the jurisdictional question of employment within thirty days after such award, is the em-

ployer foreclosed from contesting a second award of compensation for permanent disability on the ground that the employer-employee relationship did not exist at the time of the injury?

(3) Is an order of the Deputy Commissioner denying the employer's motion to set aside an award on the ground that the employer-employee relationship did not exist, a reviewable order under section 21(b) of the Act?

STATUTES INVOLVED.

(a) With respect to the first question:

Section 8(c) of the Act of February 13, 1925 (43 Stat. 936, 940; U.S.C., Title 28, §230):

> "(c) No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

(b) With respect to the second and third questions:

Sections 21 and 22 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1436, 1437; U.S.C., Title 33, §§921, 922):

> "Sec. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.
>
> (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in

part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred * * *.

Sec. 22. Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time during the term of an award and after the compensation order in respect of such award has become final, review such order in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase, or decrease such compensation. Such new order shall not affect any compensation paid under authority of the prior order."

On May 26, 1934, section 22 was amended to read as follows (48 Stat. 807; U.S.C., Title 33, §922):

"Sec. 22. Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, review a compensation case in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the

date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the commission."

SUMMARY STATEMENT OF THE CASE.

On and prior to November 15, 1929, respondent Weidemann was regularly employed as shipkeeper of a schooner belonging to Arthur E. Small lying abreast petitioner's schooner, the "Metha Nelson", in petitioner's shipyard at Alameda, California (R. 97, 131-134). While so employed, his duties permitted him to perform odd jobs for others than his employer, and, during the few months preceding November 15, 1929, petitioner had employed him on several occasions to do various odd jobs (R. 106). On November 15, 1929, petitioner authorized its employee Ernest Califro to ascertain the cubic capacity of the "Metha Nelson", and directed Califro, if necessary, to procure the assistance of Captain Klotz or Captain Weidemann (R. 39, 41). On the morning of November 15th, Califro could not find Weidemann, so he procured the services of Captain Klotz and proceeded to measure the capacity of the schooner (R. 41, 45-46). In the meantime, Captain Weidemann had been told that petitioner's agent had been hunting for him (R. 80, 98). Accordingly, while Califro and Captain Klotz were working in the hold of the vessel,

Captain Weidemann came aboard and attempted to descend into the hold (R. 46-47). In doing so he fell from the ladder and suffered the injuries to his hand for which he was awarded compensation. *At the time of this injury Weidemann was not in petitioner's employ.* The District Court expressly so found (R. 205); and this finding was accepted by the Circuit Court of Appeals. (See also the statement by Judge Wilbur in the dissenting opinion [R. 280-281].)

Weidemann was sent to a hospital and furnished medical treatment (R. 65). Almost immediately after the accident Califro left petitioner's employment and was not heard of again for nearly two years (R. 49-52, 55-57). Petitioner, in Califro's absence, believed that Captain Weidemann had been employed to assist in measuring the "Metha Nelson", and accordingly it cooperated with him and with the Deputy Commissioner in procuring a compensation award. Acting in good faith under the mistake of fact, petitioner notified the Deputy Commissioner of the accident (R. 109), prepared for Weidemann his claim for compensation (R. 114), and requested the Deputy Commissioner to make an appropriate order (R. 128). The matter was set for hearing, but petitioner was not represented at the hearing, it previously having written to the Deputy Commissioner that it desired him to pass "on the responsibility of this particular case" (R. 210). The Deputy Commissioner took the testimony of three witnesses[2], and at the conclusion of the hearing found that at the time of the injury Weidemann was in the employ of pe-

2. The transcript of this testimony is appended to the findings of fact of the District Court (R. 209-230). See finding II (R. 205).

titioner (R. 131).[3] An award of $264.28 and $25 a week during temporary disability was entered on February 1, 1930 (R. 134). This award was promptly paid and Weidemann was employed by petitioner at a wage admitting of no loss of earnings, thus arresting the continuing weekly award (R. 206).

On August 28, 1931, eighteen months after the original award, the Deputy Commissioner reopened the case and held a further hearing on the question of disability (R. 181-182). On September 16, 1931, a second order, awarding $2,541 for permanent disability, was entered (R. 155-157). Shortly after the entry of this order, petitioner for the first time learned from Califro that he had not employed Weidemann on the day of the accident (R. 49-52, 55-57); and promptly thereafter, on October 13, 1931, and within thirty days of the entry of the second compensation order, petitioner filed with the Deputy Commissioner a petition to reopen the case and to set aside the second order (R. 206-207, 183). On October 16, 1931, the Deputy Commissioner denied the petition to set aside or vacate the award (R. 206-207, 183). On November 16, 1931, the present proceeding to set aside and enjoin the orders of September 16th and October 16th was filed in the United States District Court.[4]

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3. The District Court found that the evidence upon which this finding was made was insufficient; that the Deputy Commissioner, with the exercise of reasonable care, should have known prior to the entry of the compensation order and award that Weidemann was not an employee of petitioner, and that the injury was not within the purview of the Longshoremen's and Harbor Workers' Compensation Act (R. 205).

4. The thirtieth day from the date of the order of the Deputy Commissioner of October 16, 1931, fell on Sunday, November 15, 1931. This proceeding was filed the following day. In the court below the question was raised and briefed as to whether section 21a of the Act (supra, p. 5) should be construed to permit the institution of a proceeding to

Upon a trial *de novo* of the question of the jurisdictional fact of employment (*Crowell v. Benson*, 285 U.S. 22), the District Court found that at the time of the injury respondent Weidemann was not an employee of petitioner, and that respondent Pillsbury, with the exercise of reasonable care, should have known this fact prior to the entry of the compensation order and award of February 1, 1930 (R. 205). That court also found that petitioner properly petitioned respondent Pillsbury for an order suspending his order and award of September 16, 1931, made an adequate showing thereon, and that respondent Pillsbury's order denying that petition on October 16, 1931, was an abuse of administrative and judicial discretion reviewable by the District Court under section 21 of the Longshoremen's and Harbor Workers' Compensation Act. Accordingly, the court held that petitioner was entitled to a permanent injunction against the enforcement of the compensation order of September 16, 1931 (R. 208), and decreed accordingly (R. 231).

The final decree of the District Court was entered December 27, 1934. On March 22 and 26, 1935, respectively, respondents filed notices of appeal with the clerk of the District Court (R. 233, 235); and on March 25, 1935, the district judge, in connection with respondent Pillsbury's attempted appeal, signed an order transmitting the original exhibits produced in evidence in the cause to the Circuit Court of Appeals (R. 243). No other document or order in

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set aside an award on the Monday following the thirtieth day when the thirtieth day falls on Sunday. Petitioner's contention that under such circumstances the proceeding may be filed on the Monday following was adopted by the District Court (see respondents' proposed findings III and IV [R. 197], which were refused), and was accepted by the Circuit Court of Appeals.

connection with the appeals was signed by the district or any judge within the three months' period provided by section 8(c) of the Act of February 13, 1925. No appeal was asked for or allowed in open court. The cost bond was approved on April 6, 1935, after the expiration of the three months' period (R. 245, 248). Petitioner moved to dismiss the appeals on the ground, *inter alia*, that no petition for allowance of an appeal was made to, and no appeal was allowed by, any judge or court authorized to allow appeals (R. 257). This motion was denied with opinion (R. 260-269). The court held that Admiralty Rule 1 (infra, p. 17) of the Circuit Court of Appeals for the Ninth Circuit is not inconsistent with section 8(c) of the Act of February 13, 1925, and that, under that Rule, an appeal "taken" simply by filing a notice of appeal in the office of the clerk may be entertained by the Circuit Court of Appeals.

Thereafter the decree of the District Court was reversed (R. 286). The court held (opinion R. 271-280) that the fact of employment was determined by the first compensation order of February 1, 1930, and became conclusive upon the expiration of the thirtieth day thereafter; that this jurisdictional fact was not open in a subsequent proceeding to set aside a second compensation award in the same case. Judge Wilbur, dissenting (R. 280-285), thought that the decision of the court was in conflict with *Crowell v. Benson*, 285 U.S. 22. He took the view that the Deputy Commissioner could not acquire jurisdiction and make a further and supplementary order of compensation merely by reason of an erroneous finding of a jurisdictional fact in the first instance; that such fact was open in any pro-

ceeding properly brought in the courts to obtain injunctive relief under section 21 of the Act. He was of opinion, however, that the Deputy Commissioner's order of October 16, 1931, refusing to set aside the order and award of September 16, 1931, was not a compensation order which could be reviewed under section 21 of the Act within thirty days of its entry. Accordingly, he concurred in reversal upon the ground that the compensation order of September 16th became final and conclusive, in the absence of the institution of court proceedings, upon the expiration of thirty days from the date of its filing, and that the proceeding herein, instituted November 16, 1931, was filed too late.

REASONS RELIED ON FOR THE GRANTING OF A WRIT OF CERTIORARI.

A. REASONS RELIED ON FOR THE GRANTING OF A WRIT OF CERTIORARI TO REVIEW THE ORDER OF THE CIRCUIT COURT OF APPEALS DENYING THE MOTION TO DISMISS.

(1) *The decision of the Circuit Court of Appeals is in direct conflict with decisions of other Circuit Courts of Appeals on the same question.*

The decision sought to be reviewed is in direct conflict with decisions of the First, Fourth, Sixth, Seventh and Eighth Circuit Courts of Appeals:

Baes v. People of Porto Rico (1st C.C.A.), 82 F. (2d) 317, 320-321;

Osborn v. United States (4th C.C.A.), 50 F. (2d) 712;

Ross v. White (6th C.C.A.), 32 F. (2d) 750; certiorari denied, 280 U.S. 584, No. 310, October Term, 1929;

United States v. New National Coal & Mining Co. (7th C.C.A.), 72 F. (2d) 168;

Robie v. Hart, Schaffner & Marx (8th C.C.A.), 40 F. (2d) 871;

Share v. United States (8th C.C.A.), 50 F. (2d) 669.

In *Ross v. White*, supra, appellants sought to perfect an appeal to the Circuit Court of Appeals for the Sixth Circuit by filing a notice of appeal with the clerk of the District Court. The appeal was not allowed in open court nor by order signed by the judge. The Circuit Court of Appeals dismissed the appeal, saying (pp. 751, 752):

> "The applicable section of the United States Code is title 28, §230 (28 USCA §230), being paragraph (c) of section 8 of the Act of February 13, 1925, • • •.
>
> This section superseded the portion of section 11 of the Act of March 3, 1891, c. 517, 26 Stat. 829, providing that no appeal or writ of error 'shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed'. This language, 'taken or sued out', or 'brought', as applied to a writ of error, and 'taken', as applied to an appeal, as provided in the earlier acts, has been the subject of judicial construction since early times.
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> • • • • • • •
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> But unless some novel effect is to be given to the substitution of the words 'unless application therefor be duly made' for the former provision that no appeal or writ of error 'shall be taken or sued out', the repeated adjudications, of which the foregoing citations are but a partial list, would seem to be conclusive upon the doctrine that the appellate court does not acquire jurisdiction until the appeal is allowed, either

in open court at the same term, or until the petition for appeal, or its equivalent, is presented to either a Circuit or District Judge and acted upon by such judge, or until counsel has done all that could reasonably be required of counsel to accomplish such result * * *. The mere filing with the clerk of an application or notice of appeal, not presented to the judge, cannot be construed as an application 'duly made', within the language of 28 USCA §230, which in terms refers to an allowance. Such application, to be in due form, must be made to the judge and acted upon by him."

In *Robie v. Hart, Schaffner & Marx*, supra, the Circuit Court of Appeals for the Eighth Circuit considered the same question. The court pointed out that section 8(c) of the Act of February 13, 1925 (U.S.C., Title 28, §230), was controlling and held (p. 872):

"Appellee presents a motion to dismiss the appeal. The grounds of the motion are that no appeal was allowed in open court; that no petition for appeal was presented to a judge or acted upon by such within three months after entry of judgment.

* * * * * * *

The only thing done here within such three months' period was to file a 'Notice of Appeal'.

* * * * * * *

Obviously, this was not an 'application' for an appeal, either within the above section or otherwise. * * * This 'notice' was not intended to be an application or petition for an appeal, is not such in fact, and cannot be given that effect. The statute requires an 'application' for the appeal. While courts should be rather liberal in construing that word, yet they are not at liberty to disregard its reasonable meaning, which,

> in this usage, necessarily carries the element of request. * * * The requirements of this section are mandatory and jurisdictional, and not to be avoided by consent, waiver, or, even, order of court."

In *Share v. United States*, supra, the Circuit Court of Appeals for the Eighth Circuit again emphasized the same principles. In that case notice of appeal was served and filed within the three months period, but the petition for allowance of the appeal, with accompanying order, was not filed until after the expiration of that period. The court pointed out that the procedure followed did not comply with section 8(c) of the Act of February 13, 1925, which was controlling. After quoting that statute the court said (p. 670):

> "It is apparent from the record that no application for allowance of an appeal was made within the statutory period. * * * The notice of appeal was not effective for that purpose.
>
> The requirements of the statute above quoted are jurisdictional, * * *."

In *Osborn v. United States*, supra, the Circuit Court of Appeals for the Fourth Circuit likewise reached the same conclusion (pp. 713, 714):

> "But there is another defect fatal to the appeal. The record discloses that final judgment was entered in favor of the United States on August 8, 1930, and the petition for appeal was not presented to the trial judge, nor the appeal allowed, until November 26, 1930, more than three months after the entry of final judgment. The Act of Congress (U. S. Code, title 28, §230 [28 USCA §230] provides that no appeal shall be allowed unless application therefor be duly made

within three months after the entry of the judgment or decree. The requirements of this section are mandatory and jurisdictional and not to be avoided by consent, waiver, or acquiescence, or even by an order of the court.

* * * * * * *

Counsel contends also that the appeal should be considered because the appellant gave notice of an appeal.

* * * Aside from this, a notice of appeal is not sufficient. The Act of Congress * * * requires that an 'application' must be made for the appeal. While courts may be rather liberal in construing that word, yet they are not at liberty to disregard its reasonable meaning, which in this usage necessarily carries the element of request. * * *"

None of these decisions can be distinguished on the ground that it did not involve an appeal in admiralty. The statute makes no exception of such appeals.[5] It provides that *"No appeal* * * * shall be allowed unless application therefor be duly made * * *" (italics added). And the principles of the foregoing cases have been applied by the Circuit Court of Appeals for the Third Circuit to an appeal in admiralty.

The Ruth, 20 F. (2d) 314, 316.

The Rules of the Circuit Court of Appeals for the Second Circuit expresaly provide for the allowance of appeals in admiralty[6].

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5. Compare *Barrel v. Transportation Company*, 3 Wall. 424, where this Court dismissed an appeal in admiralty on the ground that a petition for an appeal filed with the clerk of the Circuit Court, unaccompanied by an allowance of the appeal by that court, was insufficient to bring up the case for review.

6. Rule 37: "1. An appeal in Admiralty to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the district court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor, that the party appeals to the Circuit Court of Appeals from the decree complained of. *An allowance of the appeal shall be obtained and filed with the notice*" (italics added).

Nor can these cases be distinguished on the ground that the appeals in the present case were perfected pursuant to the requirements of Admiralty Rule 1 of the Circuit Court of Appeals for the Ninth Circuit, which is copied in the margin.[7] Each of the decisions is based expressly upon the provisions of section 8(c) of the Act of February 13, 1925; each emphasizes that the mandate of that statute is jurisdictional.

> "The requirements of this section are mandatory and jurisdictional, and not to be avoided by consent, waiver, or acquiescence, or even by an order of the court."
>
> *Osborn v. United States*, supra, p. 713;
>
> *Robie v. Hart, Schaffner & Marx*, supra, p. 872.

The Circuit Courts of Appeals possess only such appellate jurisdiction as is conferred by statute.

> *Realty Co. v. Montgomery*, 284 U.S. 547, 549.

And the rule-making power of those courts is by statute confined to the promulgation of "rules and regulations for the conduct of the business of the court *within its jurisdiction as conferred by law*" (italics added) (Judicial Code, §122; U.S.C., Title 28, §219).

This Court has emphasized that the rule-making power does not extend to enlarging or restricting the jurisdiction conferred by the laws of the United States.

> *Hudson v. Parker*, 156 U.S. 277, 284;
>
> *Meek v. Centre County Banking Co.*, 268 U.S. 426, 433-435.

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7. "An appeal from an interlocutory or final decree to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of."

See also:

Chisholm v. Gilmer, 299 U.S..... (decided Nov. 9, 1936);

In re Foster Const. Corporation (2d C.C.A.), 49 F. (2d) 213, 214.

(2) *The decision of the Circuit Court of Appeals is untenable on its face and should not be permitted to stand as a precedent.*

The ruling on the jurisdictional question in this case did not take the form of an unreported order but was accompanied by opinion which has been reported. This decision is untenable on its face, and should not be permitted to stand as a precedent. In its opinion the court said (78 F. (2d) 587, 590; R. 265, 267-268):

> "The purpose and, we think, the only purpose of section 8 (c) of the Act of February 13, 1925, was to shorten from six months to three months the time within which appeals might be taken to the Circuit Courts of Appeals.
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> • • • • • • •
>
> This court was not unaware of the Act of February 13, 1925, when, on June 27, 1928, it revised its rules and readopted Admiralty Rule 1, as well as General Rule 11. The revision was made in the light of and in conformity with the act. Then, as now, this court saw nothing in the act to warrant the supposition that Congress intended thereby to abrogate Admiralty Rule 1 by abolishing appeals as a matter of right and making all appeals discretionary, thus rendering it impossible in any case to 'take' an appeal. We hold that Admiralty Rule 1 is still in effect, and that the appeals in this case were properly taken."

In so ruling the court entirely misconceived the nature and purpose of section 8(c) of the Act of February 13, 1925. That Act was not intended to, nor did it, abolish "appeals as a matter of right". Its purpose was to insure that an appeal should be accorded only in cases where the right thereto in fact exists. It established a procedure under which a judge should determine *in limine* whether an appeal lies in the particular case, thus avoiding delay and preserving the appellate dockets from cases appealed without statutory right. For example, a judge to whom application for allowance of an appeal is made should refuse to allow an appeal from a nonfinal decree where the statute provides for appeal only from final decrees.[8]

The adjudications of this Court with respect to its own jurisdiction and the practice obtaining thereunder (particularly the practice under Rule 12 of the Rules of this Court) clearly indicate the patent error into which the Circuit Court of Appeals fell in the present case. Since the enactment of the Judiciary Act of 1789 the federal statutes have provided for appeals as of right from certain decisions of the state courts. Nevertheless, it has always been a requirement that such appeals be applied for and allowed, and in the absence of allowance by the appropriate judge or justice of the state court, this Court is without jurisdiction.

Butler v. Gage, 138 U.S. 52, 55.

It would hardly be contended, however, that this requirement denies an appeal as of right in the cases specified in

8. It has also been held that a judge should refuse to allow an appeal where the appeal is utterly devoid of merit, in the view that an appeal "as a matter of right" does not lie unless there is at least "a semblance or possibility of merit" in the assignment of errors. *Wolf v. United States* (8th C.C.A.), 58 F. (2d) 220.

section 237(a) of the Judicial Code and makes "all appeals discretionary" (R. 268).

To take another example, section 266 of the Judicial Code provides a direct appeal from the decisions of district courts specially constituted of three judges in certain specified cases. Again, it would hardly be contended that the provisions of the statutes and the Rules of this Court requiring presentation of a petition for the allowance of an appeal in such cases, accompanied by a jurisdictional statement disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree, and requiring that an appeal in such cases be allowed, destroy the "appeal as a matter of right" provided by the Congress under section 266 of the Judicial Code. Indeed, this Court has pointed out that if a judge refuses to allow an appeal in a proper case mandamus will lie to compel him to allow the appeal to this Court.

Ex Parte Buder, 271 U.S. 461.

The history of the Act of January 31, 1928, abolishing the writ of error (45 Stat. 54), and the amendatory Act of April 26, 1928 (45 Stat. 466), familiar to this Court, corroborates the view adopted by every Circuit Court of Appeals which has had occasion to deal with the question except the Circuit Court of Appeals for the Ninth Circuit in the instant case.[9] At a recent hearing before the Senate Committee on the Judiciary, Mr. Justice Van Devanter, in referring to the act abolishing the writ of error and its

9. Prior decisions of the Circuit Court of Appeals for the Ninth Circuit are also in conflict with its decision in the instant case (*Von Holt v. Carter*, 86 F. (2d) 61; *McBee v. Palmer*, 73 F. (2d) 342), the court here having fallen into error in attempting to sustain the validity of Rule 1 of its Admiralty Rules, although its prior decisions, above cited, clearly point out that the limitation involved is statutory and therefore controlling.

amendment, had occasion to speak of the policy underlying the statutory requirement that appeals as of right shall be applied for and allowed.[10] The requirement was also emphasized by Mr. Justice Van Devanter at the hearing before the Judiciary Committee of the House of Representatives on the bill which later became the Act of February 13, 1925.[11]

Respondents may contend, as they did in the court below, that the action of the district judge in signing the order transmitting the original exhibits (R. 243) is the equivalent of an order allowing an appeal. This contention was not adopted by the Circuit Court of Appeals and does not appear on the face of the opinion. Moreover the point is without merit. It is true that it has been held that a formal order of allowance is unnecessary and that

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10. "I think there is not anything more that I wish to state, but I will say just this closing word. It is only indirectly apropos now. That is in reference to the laudable disposition about 12 years ago to simplify resort to our Court from State courts. There was an act passed—Senator Norris will recall it—that an appeal from a State court could be taken by just lodging a notice with the clerk of the supreme court of the State. That seemed simple on its face. It seemed as though it was in the interest of avoiding technicalities here and there. It had not been in force 10 days before there were appeals from convictions of murder in the State of Washington and two or three other States where there was not an iota of a Federal question. The Court was about to adjourn for the term. The appeals were holding up the whole matter of carrying the judgments into execution.

All of those cases, if presenting a Federal question, could have come to us by appeal or writ of certiorari, but not if devoid of such a question. Chief Justice Taft, Justice Brandeis, and I had an interview with Senator Norris and Senator Walsh. A bill was passed to eliminate the loose appeals, and, barring two or three appeals—I think four—no harm was done. Legislation along these lines should fit in with the existing legislation—with the existing system—and the principles upon which the existing legislation proceeds." Statement by Mr. Justice Van Devanter before the Senate Committee on the Judiciary at the hearing on S. 2176, March 25, 1925.

11. "In section 8 (c) the bill fixes three months as the period within which *application must be made* for a writ of error or appeal to take any case before a circuit court of appeals for review" (italics added). Hearing before the Judiciary Committee of the House of Representatives on H. R. 8206, December 18, 1924, p. 16.

signing the citation or taking and approving security for the appeal is the equivalent of the allowance of an appeal.

Sage v. Railroad Company, 96 U.S. 712, 714;
Brandies v. Cochrane, 105 U.S. 262;
Brown v. McConnell, 124 U.S. 489;
Stewart v. Masterson, 124 U.S. 493;
In re Alexander MacKenzie, 180 U.S. 536, 547.

But, in addition to the fact that these cases were decided under a different statute, the signing of a citation or approving an appeal bond constitutes an affirmative act intended as an allowance of appeal. In the instant case no equivalent act was taken. The order transmitting exhibits (R. 243) was not intended as the equivalent of the allowance of an appeal. It was simply an order made under the misapprehension that an appeal had already been perfected. The action of the district judge in this case is analogous to the action of the judge in attesting the certificate of the clerk authenticating the transcript of record in *Ross v. White* (supra), 32 F.(2d) 750, 752. As was held in that case, such an order, although made in pursuance of a supposed appeal, clearly is not the equivalent of the allowance of an appeal and is insufficient to constitute a compliance with the requirement of section 8(c) of the Act of February 13, 1925.[12]

12. It should be noted that, in any event, the order transmitting original exhibits was signed only in connection with respondent Pillsbury's attempted appeal.

(3) *The decision sought to be reviewed deals with an important question relating to the jurisdiction of the Circuit Court of Appeals; it therefore involves a subject matter appropriate to the exercise of the certiorari jurisdiction.*

Chisholm v. Gilmer, 299 U.S. ___ (decided Nov. 9, 1936);

Fox v. Capital Company, 299 U.S. ___ (decided Nov. 9, 1936).

B. REASONS RELIED ON FOR THE GRANTING OF A WRIT OF CERTIORARI TO REVIEW THE FINAL DECREE OF THE CIRCUIT COURT OF APPEALS.

(1) *The decision of the Circuit Court of Appeals is inconsistent with a prior controlling decision of this Court.*

Petitioner's contention in this respect is succinctly stated in the dissenting opinion of Judge Wilbur (R. 283-284):

> "My associates, as I understand, hold that the failure to seek a judicial review of the jurisdictional question within thirty days after the first award, foreclosed that question at the time of the second, additional and greater award. This is in accord with the view of the dissenting members of the Supreme Court, as expressed by Justice Brandeis in Crowell v. Benson, supra, but is, I believe, opposed to the views of the majority of the court as stated by Chief Justice Hughes. The Supreme Court held, in effect, that the finding of the Deputy Commissioner as to the fact of employment, had no effect, probative or otherwise, upon the trial of that question in court. The validity of the Deputy Commissioner's order the Supreme

Court held depended upon the existence of a contract of employment, and his decision upon that jurisdictional question was in no way binding upon the court which was required to determine that question upon evidence presented to it, by the parties. If the Deputy Commissioner were a court rather than an adminstrative officer, his finding of jurisdiction in the first proceeding would no doubt be conclusive upon the second and supplementary application for increased compensation due to the development of conditions not foreseen or compensated for in the first instance. But the jurisdiction of the administrative officer to take any action at all is dependent upon the fact of employment and this factual question is one which Congress had no power to take away from the court (Crowell v. Benson, supra). That the first order is effective and enforcible is conceded, because not attacked within thirty days. It does not follow that the second order, which the Deputy Commissioner had no authority or jurisdiction to make, is sustainable because the previous erroneous finding of jurisdiction was consented to by the Association, and because the order was complied with in the mistaken belief that the fact was, as found by the Deputy Commissioner. The Deputy Commissioner could not acquire jurisdiction to make a further and supplementary order of relief merely by reason of his erroneous finding of the jurisdictional fact in the first instance. The law under which he acted, expressly provided that the second award like the first, was subject to attack in the courts by an application for injunctive relief, 33 U.S.C.A., Sec. 921, Subd. b, and Sec. 922, wherein, the jurisdiction of the Deputy Commissioner to make the order is a sufficient reason for granting relief. (Crowell v. Benson, supra.)"

It is submitted that these views are sound. Under the provisions of section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act (supra, p. 5) petitioner had the right to attack in the courts, through injunction proceedings, any "compensation order" not in accordance with law. No one disputes that the second order in this case, awarding compensation for permanent disability, was a "compensation order" within the meaning of section 21(b). It inevitably follows, from the terms of the statute as construed in *Crowell v. Benson*, supra, p. 62, that that order was subject to attack on the ground that the Deputy Commissioner was without jurisdiction. The court below did not disturb the finding by the District Court that at the time of the injury Weidemann was not an employee of petitioner, but put its decision upon the ground that the contrary finding on this jurisdictional fact made by the Deputy Commissioner at the first hearing was binding upon petitioner in respect of every subsequent order in the case. This conclusion was largely founded upon the court's view that under section 22 of the Act (supra, p. 6), as it read prior to the amendment of May 26, 1934 (supra, p. 6), the Deputy Commissioner was without power to reopen the case except upon a showing of a change in the employee's physical condition. It is submitted that this interpretation fails to express the intent of Congress, and that the amendment of May 26, 1934, expressly giving the Deputy Commissioner the right to review a compensation order on the ground "of a mistake in a determination of fact," was declaratory of the true meaning of the section as originally enacted.

See:

Wetmore v. Markoe, 196 U.S. 68, 76-77.

But, in any event, the power possessed by the Deputy Commissioner under the statute either before or after its amendment has no bearing upon petitioner's right to a trial *de novo* of the jurisdictional fact of employment. The statute both before and since its amendment conferred a clear right to a judicial review of any compensation order, and on such review the jurisdictional fact of employment was open for consideration by the court (*Crowell v. Benson*, supra).

(2) *The decision of the Circuit Court of Appeals involves an important question of federal law which has not been, but should be, settled by this Court.*

The District Court held that the order of the Deputy Commissioner overruling the petition to set aside his order of September 16, 1931, was a reviewable order under section 21(b) of the Act. The Circuit Court of Appeals did not disturb this conclusion. Judge Wilbur, however, took a different view, and the question is necessarily involved.

It is submitted that the decision of the District Court is correct and that the proper procedure to be followed under the Act, where mistake of fact is discovered within thirty days of the entry of an order by the Deputy Commissioner, is to bring the new facts to the attention of the Deputy Commissioner within the thirty days preceding finality (section 21(a), supra, p. 6), and give him an opportunity to rule upon them prior to resort to the courts. Under such a procedure the general purposes and intent of the statute are subserved. The provisions of the Act indicate a clear intention that all facts regarding a claim shall be determined in the first instance by the Deputy

Commissioner. As pointed out by this Court in *Crowell v. Benson*, supra, p. 43, the Act provides "that the deputy commissioner shall have full authority to hear and determine all questions in respect to the claim." The courts should not be burdened with petitions to suspend or set aside orders of the Deputy Commissioner in cases where such orders may be corrected by the Deputy Commissioner himself upon a proper factual showing. In addition it constitutes an unwarranted curtailment of the administrative functions of the Deputy Commissioner to require recourse to the courts to set aside a compensation order where the facts upon which relief is based are newly discovered and as a result have not been called to the attention of the Deputy Commissioner. Under such circumstances the appropriate procedure is the one followed in the instant case, namely, to bring the newly discovered facts to the attention of the Deputy Commissioner before his order becomes final, obtain his ruling thereon, and within thirty days seek a review of his order if it is deemed to be not in accordance with law.

The question thus presented is novel and important.[13]

(3) *The decision of the Circuit Court of Appeals construes the provisions of an important federal statute, national in scope, and involves a subject matter heretofore deemed by this Court worthy of review under the certiorari jurisdiction.*

Del Vecchio v. Bowers, 296 U.S. 280, 285.

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13. See the 19th Annual Report of the United States Employees' Compensation Commission. Table 18, p. 52, indicates that 26,188 non-fatal, and 144 fatal injuries were reported by employers for the fiscal year 1934-1935.

CONCLUSION.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein, and that the decree of the Circuit Court of Appeals for the Ninth Circuit be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

Dated, San Francisco, California,
December 2, 1936.

F. D. MADISON,
FRANCIS GILL,
Counsel for Petitioner.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

FILED
FEB 17 1937
CHARLES ELMORE CR
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No. 558

ALASKA PACKERS ASSOCIATION (a corporation),
Petitioner,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and FRANK WEIDEMANN.

BRIEF FOR PETITIONER

on Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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In the Supreme Court
OF THE
United States

October Term, 1936

No. 558

Alaska Packers Association (a corporation),
Petitioner,

vs.

Warren H. Pillsbury, as Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and Frank Weidemann.

BRIEF FOR PETITIONER

on Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

OPINIONS BELOW.

The District Court rendered no opinion. Its findings and conclusions are at R. 204-208. The opinion of the Circuit Court of Appeals on the motion to dismiss the appeals to it

(R. 260) is reported in 78 F.(2d) 587. The opinion and dissenting opinion on the merits (R. 271, 280) are reported in 85 F.(2d) 758. In view of the limitation in the order granting certiorari, only the opinion on the motion to dismiss is material.

STATEMENT OF THE CASE.

Section 8(c) of the Act of February 13, 1925 (43 Stat. 936, 940; U.S.C. 28:230) provides as follows:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

Admiralty Rule 1 of the Circuit Court of Appeals for the Ninth Circuit, as revised June 27, 1928, from a similar rule adopted May 21, 1900 (100 Fed. iii, quoted R. 262), provides in part as follows:

> "An appeal from an interlocutory or final decree to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of."

The case is before this court upon the following order:

> "The petition for writ of certiorari is granted, limited to the question of the operation of the Act of February 13, 1925, and its effect upon Rule 1 of the Admiralty Rules of the Circuit Court of Appeals for

the Ninth Circuit with respect to the mode of taking an appeal."

The question arises as follows: The respondent Frank Weidemann was injured on board a ship belonging to petitioner and lying in a shipyard at Alameda, California. The respondent Warren H. Pillsbury, as deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424; U.S.C. 33:901 et seq.) made an award in Weidemann's favor. The District Court set aside the award and enjoined Pillsbury from enforcing it (R. 231).*

Respondents Weidemann and Pillsbury filed and served separate notices of appeal to the Circuit Court of Appeals (R. 233, 235). Petitioner moved that court to dismiss the appeals on the ground that they had not been petitioned for or allowed (R. 257). The Circuit Court of Appeals denied the motion (R. 260; 78 F. (2d) 587), holding that section 8(c) of the Act of February 13, 1925, does not require that an appeal in admiralty shall be applied for and allowed; that its Admiralty Rule 1, providing for the taking of an appeal merely by filing with the clerk and serving upon the adverse party notice of appeal, is, therefore, valid; and that accordingly it had jurisdiction of the appeals in this case, notwithstanding they had not been allowed.**

*The facts involved in this ruling are not material under the order granting certiorari and therefore are not stated. They appear at pages 7 to 12 of the petition for certiorari.

**We find no rule in any other circuit corresponding to Admiralty Rule 1 of the Circuit Court of Appeals for the Ninth Circuit. The rule requiring that appeals, generally, be applied for and allowed is substantially the same in all circuits, including the Ninth. Rule 11 of the First, Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits, Rule 10 of the Second and Seventh Circuits,

The foregoing statement comprises all of the facts which appear to us to be pertinent under the limitation in the order granting certiorari. That order, it seems to us, confines review in this court to the question of the validity of Admiralty Rule 1 under the Act of February 13, 1925: that is to say, the question whether allowance of the appeals was necessary—not, whether they were in fact allowed. The Circuit Court of Appeals gave no consideration to the latter question, evidently being of the view that there was no substantial basis for raising it on this record. It pointed out (R. 264) that "The appeals in this case were taken by filing and serving notices of appeal, as provided in Ad-

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and Rule 23 of the Eighth Circuit. (See "Court Rules," Vol. 1-A, L.Ed. Digest of the United States Supreme Court Reports, Supplement No. 3.)

Numerous provisions of the rules of the various Circuit Courts of Appeals, other than the rules just mentioned, disclose a uniform practice requiring the allowance of all appeals:

First Circuit—Rules 13 (par. 2), 14 (pars. 9, 12), 16 (par. 3), 35.
Second Circuit—Rules 32, 36.
Third Circuit—Rules 13 (par. 2), 14 (pars. 1, 8), 15 (par. 1), 17 (par. 2).
Fourth Circuit—Rules 13 (par. 2), 14 (pars. 1, 5, 7), 16 (pars. 1, 2), 19 (par. 3), 23 (par. 6), 36 (pars. 2, 3, 5), 37, 40; and see appendix to the rules, "Instructions as to Taking Appeals, Making Up Records, etc."
Fifth Circuit—Rules 13 (par. 2), 14 (par. 5), 16 (par. 1), 23 (par. 8), 37 (pars. 1, 2), 39.
Sixth Circuit—Rules 13, 14, 15 (par. 1), 18 (par. 2), 34 (pars. 1, 4).
Seventh Circuit—Rules 12 (par. 2), 13 (pars. 1, 3), 13-a, 14 (par. 1), 31 (par. 1).
Eighth Circuit—Rules 24 (par. 1), 25 (par. 2), 26 (par. 1).
Ninth Circuit—Rules 13 (par. 2), 16 (par. 1).
Tenth Circuit—Rules 12 (par. 2), 13 (pars. 1, 2), 14 (par. 1), 31.

The Second and Ninth are the only circuits having special admiralty rules. The rules of the First and Fourth Circuits, however, refer expressly to the requirement that appeals in admiralty, like all other appeals, must be allowed. See Rule 14, pars. 8 and 9, of the First Circuit; Rule 14, par. 7, of the Fourth Circuit, as supplemented by the instructions contained in the appendix to those rules with respect to the record on appeal, especially, the note to the form of memorandum to be inserted in the record as provided by section 7 of Rule 14 ("Court Rules," Supplement No. 3, supra, p. 68).

Rule 37 of the Second Circuit provides that admiralty appeals shall be taken by serving and filing notice, but also provides, by amendment adopted December 10, 1928: *"An allowance of the appeal shall be obtained and filed with the notice."* [All italics throughout this brief are ours unless otherwise stated.]

It thus appears that Admiralty Rule 1 of the Ninth Circuit provides the only exception in the rules of the ten circuits with reference to the requirement that appeals in all cases shall be allowed.

miralty Rule 1." The memorandum submitted by the Solicitor General prior to the granting of certiorari suggests, however, a question other than that of the validity of Admiralty Rule 1, namely, whether two orders obtained by respondent Pillsbury—one for the transmission of original exhibits (R. 243), and the other for the omission of certain material from the apostles (R. 250-251)—were the equivalent of an allowance of Pillsbury's appeal. Weidemann, who obtained no such orders, argues that the orders as to Pillsbury dispensed with the necessity for the allowance of Weidemann's appeal (see Weidemann's Brief Opposing Issuance of Certiorari, p. 12). Notwithstanding our belief that this question is outside the scope of the order allowing certiorari, we will answer it in our argument.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals erred in deciding that it had jurisdiction to entertain the appeals from the District Court and erred in denying petitioner's motion to dismiss the appeals.

SUMMARY OF ARGUMENT.

First. The statute requires that all appeals, including admiralty appeals, be applied for and allowance thereof obtained. Its language is clear to this effect and presents no question of construction. This has been decided in five circuits, with the case here under review alone standing to the contrary.

Second. Even if the question were one of construction, the statute should be construed as making allowance of appeals a jurisdictional requisite. Such construction accords with the intention of Congress, and with the uniform course of decisions under this statute and prior statutes, and protects the dockets from appeals in cases where jurisdiction obviously does not exist or the conditions of appeal have not been complied with.

Third. Answering considerations urged by the Circuit Court of Appeals (R. 265, et seq.), the question here involved does not turn on whether the statute makes appeals discretionary or allows them as of right. There is nothing inconsistent about requiring that appeals be applied for and allowed in cases where they are of right. Such is and has been the uniform and time-honored practice of this court and of the lower federal courts. Neither does the expression that "an appeal may be taken," in the statutes mentioned in the opinion of the Circuit Court of Appeals, indicate that allowance thereof is not required.

Fourth. The orders sending up original exhibits and authorizing omissions from the apostles were not equivalent to an allowance of Pillsbury's appeal. Furthermore, if Pillsbury ever had any right of appeal under the Longshoremen's and Harbor Workers' Compensation Act under the circumstances here presented, such right has become moot. This is because Weidemann is the sole beneficiary of the decree, and the decree has become final *against* Weidemann, so that there is no right which Pillsbury could enforce or vindicate if his appeal were successful. Still further, the court was without jurisdiction because there was no summons and severance as to Weidemann.

ARGUMENT.

FIRST: THE STATUTE REQUIRES THAT ALL APPEALS, INCLUDING ADMIRALTY APPEALS, BE APPLIED FOR AND ALLOWANCE THEREOF OBTAINED. ITS LANGUAGE IS CLEAR TO THIS EFFECT AND PRESENTS NO QUESTION OF CONSTRUCTION. THIS HAS BEEN DECIDED IN FIVE CIRCUITS, WITH THE CASE HERE UNDER REVIEW ALONE STANDING TO THE CONTRARY.

In *Ross v. White* (6th C.C.A., 1929) 32 F. (2d) 750, certiorari denied (280 U. S. 584), the appellants filed a notice of appeal but made no application to the court and obtained no order of allowance. The Circuit Court of Appeals dismissed the appeal. It reviewed many decisions of this court, and of other federal courts, under earlier statutes, all holding that allowance of appeal is a jurisdictional requisite. Then, with respect to section 8(c) of the Act of February 13, 1925, the court said (p. 752):

> "But unless some novel effect is to be given to the substitution of the words 'unless application therefor be duly made' for the former provision that no appeal or writ of error 'shall be taken or sued out' the repeated adjudications, of which the foregoing citations are but a partial list, would seem to be conclusive upon the doctrine that *the appellate court does not acquire jurisdiction until the appeal is allowed, either in open court at the same term, or until the petition for appeal, or its equivalent, is presented to either a Circuit or District Judge and acted upon by such judge, or until counsel has done all that could reasonably be required of counsel to accomplish such result* (viz. as in *Randall Co. v. Foglesong Machine Co.*, supra). *The mere filing with the clerk of an application or notice of appeal, not presented to the judge, cannot be construed as an application 'duly made,' within the language of 28 USCA §230, which in terms refers to an allowance. Such ap-*

plication, to be in due form, must be made to the judge and acted upon by him.''

In accord with the foregoing decision from the Sixth Circuit, and all holding that under the statutory language a Circuit Court of Appeals is without jurisdiction of an appeal taken on notice alone, are the following decisions from the First, Fourth, Seventh, and Eighth Circuits:

Baez v. People of Puerto Rico (1st C.C.A., 1936) 82 F. (2d) 317, 320-321;

Osborn v. United States (4th C.C.A., 1931) 50 F. (2d) 712, 713;

United States v. New National Coal & Mining Co. (7th C.C.A., 1934) 72 F. (2d) 168;

Robie v. Hart, Schaffner & Marx (8th C.C.A., 1930) 40 F. (2d) 871;

Share v. United States (8th C.C.A., 1931) 50 F. (2d) 669, 670.

We know of no contrary authority, except the present case, which is not only against the above cited decisions from five other circuits, but also against earlier decisions in the Ninth Circuit itself.

In *McBee v. Palmer* (9th C.C.A., 1934) 73 F. (2d) 342, the court held that an appeal in a "controversy in bankruptcy," though an appeal of right, cannot be taken by mere notice, but that it must be applied for and allowance obtained. The court quoted with approval from *Ross v. White*, supra, then cited *Robie v. Hart, Schaffner & Marx*, supra, and said (p. 344):

"This case holds that the 'notice of appeal' is not sufficient to perfect an appeal but that application therefor must be duly made and allowance had."

To the same effect is *Von Holt v. Carter* (9th C.C.A., 1932) 56 F. (2d) 61, dismissing an appeal from Hawaii, where a petition for appeal had been filed but not presented or allowed within the statutory period. The court said (p. 63):

> "The facts herein bring this case squarely under the rule laid down by the Circuit Court of Appeals for the Sixth Circuit in the case of *Ross v. White*, 32 F. (2d) 751. That case is so exhaustive in its citations of authorities discussing the question here involved, and is so well-reasoned, that any repetition here of the points there considered would be superfluous. It is clear that the mere filing of a petition for appeal in the clerk's office, even though addressed to the Court, is of no avail, unless accompanied by an allowance of an appeal by the Court, *and cannot be considered an application 'duly made' within the language of the statute which in terms refers to an 'allowance'.*"

It is true that none of the foregoing cases involved an appeal in admiralty. But the statute is general—"*No appeal* • • • shall be *allowed* unless *application* therefor be duly made • • •". This language includes admiralty just as well as law, equity, or bankruptcy. It was evidently so considered in *The Ruth* (3rd C.C.A., 1927) 20 F. (2d) 314, an admiralty case, in which the court said (p. 316):

> "If the appellant was late in applying for the allowance of an appeal there is substance in the ground for dismissal because the limitation of this section is mandatory and therefore jurisdictional."

In *The Ruth* the appeal was not dismissed because it had been seasonably applied for and the delay in allowance was attributable to the court. The case shows, however, that

the court considered the allowance of an admiralty appeal to be a jurisdictional requisite under the statute here involved.

This court apparently has not had occasion to consider the provisions of section 8(c) of the Act of February 13, 1925. Nevertheless, the foregoing decisions find direct confirmation in the practice of this court requiring the allowance of appeals in all cases* under the terms of section 8(a) of the same statute, which contains identical provisions respecting the mode of appeal.**

If, as the foregoing considerations show, section 8(c) of the statute requires that appeals to the circuit courts of appeals be applied for, and makes it a requisite of appellate jurisdiction that allowance thereof be obtained, then it follows that Admiralty Rule 1 of the Ninth Circuit is invalid. The circuit courts of appeals have only such jurisdiction as is conferred by statute (*Realty Co. v. Montgomery* (1932) 284 U. S. 547, 549). Their rule-making power is confined to rules for conducting "the business of the court *within its jurisdiction as conferred by law*" (Judicial Code, sec. 122; U.S.C. 28:219). Court rules cannot alter or do away with statutory requirements (*Hudson v. Parker* (1895) 156 U.S. 277, 284; *Meek v. Centre County Banking Co.* (1925) 268 U.S. 426, 433-435; *Chisholm v. Gilmer* (1936) 299 U.S. 99; *In re Foster Const. Corporation* (2d C.C.A., 1931) 49 F. (2d) 213, 214).

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*Rules 12, 36, 46, of the Rules of this court.

**"That no writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, * * *." Act of February 13, 1925, section 8(a), 43 Stat. 936, 940; U.S.C. 28:350.

SECOND: EVEN IF THE QUESTION WERE ONE OF CONSTRUCTION, THE STATUTE SHOULD BE CONSTRUED AS MAKING ALLOWANCE OF APPEALS A JURISDICTIONAL REQUISITE. SUCH CONSTRUCTION ACCORDS WITH THE INTENTION OF CONGRESS, AND WITH THE UNIFORM COURSE OF DECISIONS UNDER THIS STATUTE AND PRIOR STATUTES, AND PROTECTS THE DOCKETS FROM APPEALS IN CASES WHERE JURISDICTION OBVIOUSLY DOES NOT EXIST OR THE CONDITIONS OF APPEAL HAVE NOT BEEN COMPLIED WITH.

If the problem here were to construe the statute rather than to apply its clear language, the first inquiry would be concerning the intent of Congress in passing it. This intent can be shown with unusual clearness.

In the hearings on the bill which later became the Act of February 13, 1925, Mr. Justice Van Devanter pointed out that section 8(c) required application for an appeal (Hearing before the Judiciary Committee of the House of Representatives on H.R. 8206, December 18, 1924, p. 16):

> "In section 8 (c) the bill fixes three months as the period within which *application must be made* for a writ of error or appeal to take any case before a circuit court of appeals for review."

By section 2 of the Act of January 31, 1928, it was provided that an appeal might be taken on notice only and that

> "no petition of appeal or allowance of an appeal shall be required" (45 Stat. 54).

This provision was in force for less than three months. On April 26, 1928, it was repealed (45 Stat. 466; U.S.C. 28:861b), for reasons given in House Report No. 1071, 70th Cong. 1st Sess., accompanying the bill (H.R. 12441) which became the Act of April 26, 1928. This report begins with

a favorable recommendation by the committee, together with a recital of the terms of the Act, and continues:

> "It would appear, and an instance of it has already transpired, that this section would create such a loose method of practice with regard to cases in which the writ of error is abolished that there is great necessity for remedial legislation limiting the freedom with which appeals can be taken and restoring those safeguards which surrounded the granting of the writ of error and protected it from abuse.
>
> Under the Act of January 31, 1928, no petition of appeal or allowance of an appeal is required. This could lead to great abuse because there being no regulation requiring submission by petition or otherwise of the case to the court for the purpose of determining whether or not it involved a federal question that could be made the subject of appeal or was in and of itself a case appealable to the higher courts. [The report then refers also to the absence of provision for bond for costs.]
>
> If the provisions of section 2 remain unamended the courts docket may be burdened very greatly. It has, therefore, been deemed wise to offer the amendment contained in this bill.
>
> The chief justice and another member of the court appeared before this committee and approved of this amendment."

The foregoing quotation shows that the statute modifying the Act of February 13, 1925, by doing away with the necessity of petitions for and allowances of appeals was repealed to restore that requirement—a meaningless proceeding if the requirement did not exist under the Act of February 13, 1925, or if it could be destroyed by a court

rule. And the reasons which motivated Congress in this change of the law are just as applicable to admiralty appeals as to other appeals.

The purpose and intent of the statute, as understood by Congress, can be further and more recently illustrated. On March 25, 1935, the Chief Justice, Mr. Justice Van Devanter, and Mr. Justice Brandeis, at the request of the Judiciary Committee of the Senate, appeared before that Committee to present the views of the members of the court with respect to a pending bill dealing with the court's appellate jurisdiction. Among other things that bill provided for the taking of appeals merely by the filing of notice. In the course of his remarks, Mr. Justice Van Devanter pointed out that such a provision is inconsistent with existing legislation, and directed the attention of the Committee to the reasons which underlay the amendment restoring the necessity for allowance of appeals (Hearing before the Committee on the Judiciary, United States Senate, 74th Cong. 1st Sess. on S. 2176, March 25, 1935, p. 10):

> "I think there is not anything more that I wish to state, but I will say just this closing word. It is only indirectly apropos now. That is in reference to the laudable disposition about 12 years ago to simplify resort to our Court from State courts. There was an act passed—Senator Norris will recall it—that an appeal from a State court could be taken by just lodging a notice with the clerk of the supreme court of the State. That seemed simple on its face. It seemed as though it was in the interest of avoiding technicalities here and there. It had not been in force 10 days before there were appeals from convictions of murder in the State of Washington and two or three other

States where there was not an iota of a Federal question. The Court was about to adjourn for the term. The appeals were holding up the whole matter of carrying the judgments into execution.

All of those cases, if presenting a Federal question, could have come to us by appeal or writ of certiorari, but not if devoid of such a question. Chief Justice Taft, Justice Brandeis, and I had an interview with Senator Norris and Senator Walsh. A bill was passed to eliminate the loose appeals, and, barring two or three appeals—I think four—no harm was done. *Legislation along these lines should fit in with the existing legislation—with the existing system—and the principles upon which the existing legislation proceeds.*"

Since the intention of Congress thus clearly appears, and since there is no distinction either in the reason for the statute or in the statutory language between admiralty appeals and other appeals, it follows that the earlier law on allowance of appeals is not a material factor. If, however, it should be considered, it is a further argument against the decision below. Allowance of appeals has been considered jurisdictional throughout the history of the federal courts, even under statutory language less explicit than that here involved, a fact which Congress knew when it passed the present statute, and as to which we find no distinction in the authorities between admiralty and other causes.*

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*Petitioner does not concede, as stated at page 4 of respondent Weidemann's Brief Opposing Issuance of Certiorari, that Admiralty Rule 1 of the Ninth Circuit was valid and the procedure it provided adequate under the Act of March 3, 1891. We do believe that, in view of the unequivocal terms of section 8(c) of the Act of February 13, 1925, the prior procedure is not controlling. Nevertheless, as stated in the text above, we contend that the allowance of appeals in admiralty has been a jurisdictional requirement since the formation of the federal judiciary.

The 25th section of the Judiciary Act of 1789 (1 Stat. 85, 86) provided that upon writs of error from this court to a state court, the citation should be signed by the chief justice, or judge or chancellor of the state court, or by a justice of the Supreme Court. Under this provision, later carried into section 999 of the Revised Statutes (U.S.C. 28:868), it was held that unless the writ were allowed, this court acquired no jurisdiction. In *Havnor v. New York* (1898), 170 U.S. 408, 410, the court said (p. 410):

> "It was essential, *in order to confer jurisdiction on this court,* that the chief judge of the Court of Appeals of New York or his lawful substitute or a Justice of this court should have allowed the writ and signed the citation.

Thus, it is provided in the Revised Statutes as follows:

> 'Sec. 999. When the writ' (of error) • • • 'is issued by the Supreme Court to a state court, the citation shall be signed by the Chief Justice, a judge, or chancellor of such court, rendering the judgment or passing the decree complained of, or by a Justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice.'

The provision referred to was contained in the twenty-fifth section of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 86, and section 7 of the act of February 5, 1867, c. 29, 14 Stat. 387. It was construed in *Bartemeyer v. Iowa,* 14 Wall. 26, where the court, taking notice *sua sponte* of the fact that there had been no proper allowance of a writ of error, said (p. 27):

> '• • • *It has been the settled doctrine of this court that a writ of error to a state court must be allowed*

> *by one of the judges above mentioned, or it will be dismissed for want of jurisdiction,* and the case before us raises the question whether the writ has been allowed by the judge authorized to do so.' "

Similar cases are *Twitchell v. Commonwealth of Pennsylvania* (1868) 7 Wall. 321, 324, 325; *Gleason v. Florida ex rel. Attorney General* (1869) 9 Wall. 779, 783, 784; *Hartford Fire Ins. Co. v. Van Duzer* (1869) 9 Wall. 784, note; and *Butler v. Gage* (1891) 138 U.S. 52, 55.

With respect to appeals and writs of error bringing causes from lower federal courts to this court, section 999 of the Revised Statutes (U.S.C. 28:868), tracing back to the Judiciary Act of 1789 (see 1 Stat. 84, 85, 86), similarly provided for signature of citation by designated judges, and this was held to make allowance of the appeal or writ of error a jurisdictional requirement. Cases so holding are *Washington County v. Durant* (1868) 7 Wall. 694; *Pierce v. Cox* (1869) 9 Wall. 786, 19 L. Ed. 786; *Barrel v. Transportation Company* (1865) 3 Wall. 424, reported under the name *Barrel v. The Mohawk,* 18 L. Ed. 168, an admiralty appeal; *Credit Co. v. Ark. Central Railway* (1888) 128 U.S. 258; *Monger v. Shirley* (1872) 131 U.S., Append., cx; *Brandies v. Cochrane* (1881) 105 U.S. 262; and *Brown v. McConnell* (1888) 124 U.S. 489, 491.

A brief history of the rule in this court is given at sections 347, 366, and 373 of Robertson and Kirkham's *Jurisdiction of the Supreme Court of the United States.*

Admiralty cases applying or referring to the rule that allowance of appeal is jurisdictional are *Barrel v. Transportation Company* (1865) 3 Wall. 424, supra; *McLellan v.*

United States (1812) 1 Gall. 227, Fed. Cas. No. 8895; *The Spark v. Lee Choi Chum* (1872) 1 Sawy. 713, Fed. Cas. No. 13,206; *Chamberlain Transp. Co. v. South Pier Coal Co.* (1903) 126 Fed. 165, 166; *The Douro* (1865) 3 Wall. 564, 566; *The Protector* (1870) 11 Wall. 82, 86; *The Dos Hermanos* (1825) 10 Wheat. 306, 311.

As to the circuit courts of appeals, prior to the Act of February 13, 1925, appeals from lower courts were governed by the Act of March 3, 1891 (c. 517, 26 Stat. 829). Section 11 of this statute provided in part:

> "That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed * * *."

The section further made effective as to the circuit court of appeals

> "all provisions of law now in force regulating the methods and system of review, through appeals or writs of error * * *."

As already shown, the existing "methods and system of review" made allowance of appeals jurisdictional.

Section 11 further provided that

> "any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

This statute contemplated allowance of appeals, and with respect to it the court in *Green v. City of Lynn* (1st C.C.A., 1898) 87 Fed. 839, said (p. 840):

> "Though the supreme court has often said that signing a citation or approving a bond is equivalent in law to the allowance of an appeal, it has never said, so far as we can discover, that an allowance in some form could be dispensed with, * * *. The act of March 3, 1891, by its provisions recognizes the necessity for an allowance * * *."

Similar cases are *American Seating Co. v. Bullard* (6th C.C.A., 1923), 290 Fed. 896, 899, and *Blaffer v. New Orleans Water Supply Co.* (5th C.C.A., 1908), 160 Fed. 389, 390, 391.

From all points of view it is clear that section 8(c) of the Act of February 13, 1925, makes allowance of appeal a jurisdictional requisite, and should be so construed if its language permitted of construction. This is shown by its history, but even more clearly by the reasons which prompted Congress in passing it, all of which apply to admiralty appeals in the same way as other appeals.

THIRD: ANSWERING CONSIDERATIONS URGED BY THE CIRCUIT COURT OF APPEALS (R. 265, ET SEQ.), THE QUESTION HERE INVOLVED DOES NOT TURN ON WHETHER THE STATUTE MAKES APPEALS DISCRETIONARY OR ALLOWS THEM AS OF RIGHT. THERE IS NOTHING INCONSISTENT ABOUT REQUIRING THAT APPEALS BE APPLIED FOR AND ALLOWED EVEN IN CASES WHERE THEY ARE OF RIGHT. SUCH IS AND HAS BEEN THE UNIFORM AND TIME-HONORED PRACTICE OF THIS COURT AND OF THE LOWER FEDERAL COURTS. NEITHER DOES THE EXPRESSION THAT "AN APPEAL MAY BE TAKEN," IN THE STATUTES MENTIONED BY THE CIRCUIT COURT OF APPEALS, INDICATE THAT ALLOWANCE THEREOF IS NOT REQUIRED.

The Circuit Court of Appeals considered at some length the question whether, under section 8(c) of the Act of February 13, 1925, appeals are discretionary or of right (R. 265-268). It is only fair to say that this question was discussed by the parties, ourselves included. We believe, however, that it has no bearing on the question in hand.

There is no inconsistency between an appeal as of right and a requirement that such appeal be applied for and allowed. Rules 12, 36, and 46 of this court provide that all appeals must be sought and allowed, and that a jurisdictional statement be presented with the petition for appeal. These rules make no exception of appeals as of right.

In *McBee v. Palmer* (1934) 73 F. (2d) 342, an earlier decision of the court below, it was held that an appeal in a "controversy in bankruptcy," though an appeal of right, cannot be taken by mere notice, but must be applied for and that allowance thereof is jurisdictional.

The Circuit Court of Appeals, in the present opinion, made the further point that under section 11 of the Act of March 3, 1891 (c. 517, 26 Stat. 829), an appeal could be "taken" by notice without allowance, and it refers to the

word "taken" in sections 1 and 10 of the Act of February 13, 1925 (43 Stat. 937, 941), and in other statutes as indicating that section 8(c) was not intended to change the rule. This, we submit, is not a sound argument—the word "taken" does not imply that allowance is unnecessary.

In *Ross v. White* (6th C.C.A., 1929) 32 F. (2d) 750, the court, after referring to section 8(c), said (p. 751):

> "This section superseded the portion of section 11 of the Act of March 3, 1891, c. 517, 26 Stat. 829, providing that no appeal or writ of error 'shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed.' This language, 'taken or sued out,' or 'brought,' as applied to a writ of error, and 'taken,' as applied to an appeal, as provided in the earlier acts, has been the subject of judicial construction since early times."

The court then reviewed many decisions of this court and of the lower federal courts (p. 751), most of which are cited in the preceding subdivision of this brief, holding that allowance by the court is necessary in order that an appeal shall be "taken" or "brought" or a writ of error "sued out." The court then said that

> "• • • the repeated adjudications, of which the foregoing citations are but a partial list, would seem to be conclusive upon the doctrine that the appellate court does not acquire jurisdiction until the appeal is allowed, either in open court at the same term, or until the petition for appeal, or its equivalent, is presented to either a Circuit or District Judge and acted upon by such judge, or until counsel has done all that could reasonably be required of counsel to accomplish such result" (p. 752).

Even more significant is the fact that although every statute permitting an appeal as of right from the district courts to this court provides that the appeal may be "taken,"* these cases are all subject to Rules 12, 36, and 46, requiring petitions for appeal, jurisdictional statements, and allowance of appeal.

In the brief of the respondent Weidemann opposing the issuance of certiorari (p. 12) reference is made to the provision in subdivision K of Rule 49 of the Admiralty Rules of 1920 (254 U.S., Append., pp. 22, 23) that "notice of or prayer for an appeal is to be included in the apostles." This rule, the respondent argues, recognizes that the circuit courts of appeals may provide for admiralty appeals by notice without allowance. But Rule 49 was adopted prior to the Act of February 13, 1925, and therefore has no bearing on the question now before the court. Nor does it follow that the rule recognized admiralty appeals without allowance, even before that statute. The authorities already cited are to the contrary. Furthermore, it is not inconsistent to have an appeal upon notice, but still to pro-

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*The five statutes permitting direct appeal from the district courts (Judicial Code, section 238; U.S.C. 28:345) provide in part as follows:

(a) The Expediting Act—appeals "must be *taken* within sixty days * * *" (Act of February 11, 1903, c. 544, section 2, 32 Stat. 823, as amended June 25, 1910, c. 428, 36 Stat. 854; U.S.C. 15:29; U.S.C. 49:45).

(b) The Criminal Appeals Act—"A writ of error [now appeal] may be *taken*," etc. (Act of March 2, 1907, c. 2564, 34 Stat. 1246; U.S.C. 18:682).

(c) Section 266 of the Judicial Code—"An appeal may be *taken* direct to the Supreme Court * * *" (Act of March 4, 1913, c. 160, 37 Stat. 1013, as amended by section 1 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 938; U.S.C. 28:380).

(d) The Urgent Deficiencies Act—"A final judgment or decree of the district court may be reviewed * * * if appeal to the Supreme Court be *taken* * * *" (Act of October 22, 1913, 38 Stat. 208, 219-221; U.S.C. 28:47, 47a).

(e) The Packers and Stockyards Act (Act of August 15, 1921, section 316, c. 64, 42 Stat. 159; U.S.C. 7:217). The provisions of the Urgent Deficiencies Act (supra) relating to injunction suits against orders of the Interstate Commerce Commission are made applicable by this section to proceedings to restrain or annul orders of the Secretary of Agriculture under the Packers and Stockyards Act.

vide that it shall not be effective unless allowed. Rule 37 of the Second Circuit is an illustration; it provides that appeals in admiralty shall be taken by filing and serving notice, but that "An allowance of the appeal shall be obtained and filed with the notice."

FOURTH: THE ORDERS SENDING UP ORIGINAL EXHIBITS AND AUTHORIZING OMISSIONS FROM THE APOSTLES WERE NOT EQUIVALENT TO THE ALLOWANCE OF PILLSBURY'S APPEAL. FURTHERMORE, IF PILLSBURY EVER HAD ANY RIGHT OF APPEAL SUCH RIGHT HAS BECOME MOOT. THIS IS BECAUSE WEIDEMANN IS THE SOLE BENEFICIARY OF THE DECREE, AND THE DECREE HAS BECOME FINAL AGAINST WEIDEMANN, SO THAT THERE IS NO RIGHT WHICH PILLSBURY COULD ENFORCE OR VINDICATE IF HIS APPEAL WERE SUCCESSFUL. STILL FURTHER, THE COURT WAS WITHOUT JURISDICTION BECAUSE THERE WAS NO SUMMONS AND SEVERANCE AS TO WEIDEMANN.

In the memorandum of the Solicitor General on the application for certiorari (p. 2), it is suggested that two orders obtained by Pillsbury in the District Court—one for the transmission of original exhibits, the other for omission of certain material from the apostles (R. 243, 250-251)—were sufficient to constitute an allowance of Pillsbury's appeal. Weidemann obtained no corresponding order, but he argues that the orders as to Pillsbury obviated the need for allowance of his (Weidemann's) appeal (Brief Opposing Issuance of Certiorari, pp. 12-15).

While we do not believe these contentions are within the scope of the order granting the writ, we nevertheless answer them as follows:

(a) The orders in question are not comparable to the signing of a citation or approval of an appeal bond, which acts were held to be the equivalent of allowance of appeal in *Sage v. Railroad Co.* (1877) 96 U. S. 712, 714, and other cases cited by us at page 22 of the petition for certiorari. The principle underlying these cases is that "No formal order of allowance of an appeal is necessary. • • • It is sufficient if the action of the court below shows that an appeal was prayed, and was in fact allowed" (*Chamberlain Transp. Co. v. South Pier Coal Co.* (7th C.C.A., 1903) 126 Fed. 165, 166). There must be "some action by the court that may be construed as an allowance of the writ" (*Vaughan v. American Ins. Co.* (5th C.C.A., 1926) 15 F. (2d) 526, 527.

Admittedly the allowing of an appeal was not in the mind of the judge when he signed the orders here in question, or of Pillsbury's counsel when he presented them. On the contrary, it is clear, as pointed out by the court below, "That the appeals in this case were taken by filing and serving notices of appeal as provided in Admiralty Rule 1" (R. 264). The orders here in question deal with formal matters having no relation to the allowance of an appeal, but, on the contrary, presupposing that an appeal already had been taken in compliance with statutory requirements. Under these circumstances it is clear that this case is in no way within the principle of the foregoing decisions sustaining appeals where the bond was approved or the citation signed. Furthermore, these earlier cases were decided under section 999 of the Revised Statutes, not under the Act of February 13, 1925.

We find no case directly in point, but the closest one is *Ross v. White* (6th C.C.A., 1929) 32 F. (2d) 750. It was there decided that the action of the judge in attesting the certificate of the clerk authenticating the transcript, although made in pursuance of a supposed appeal, is not equivalent to allowance of an appeal and is insufficient to comply with section 8(c) of the Act of February 13, 1925.

In *Vaughan v. American Ins. Co.*, supra, plaintiff in error obtained orders extending the term for the purpose of allowing him to present a petition for a writ of error and to have settled a bill of exceptions. Within the term as thus extended, but beyond the statutory time for the taking of an appeal, the petition for writ of error was presented to and allowed by the District Court. In dismissing the appeal the Circuit Court of Appeals said (15 F. (2d) 527):

> "It is contended by plaintiff in error that he gave notice of appeal in open court at the time the judgment was entered. This is not substantiated by the record, but it is immaterial. It may be conceded that a writ of error may be applied for by motion in open court, but merely giving notice of the intention to take such action in future amounts to nothing. The running of the statute is not stayed, unless there is some action by the court that may be construed as an allowance of the writ. Certainly that was not the case here, as the orders entered clearly indicate that it was contemplated that the writ of error would be subsequently applied for within the delay granted."

(b) The decree of the District Court adjudges that Weidemann is entitled to nothing, sets aside the award,

and enjoins Pillsbury from enforcing it (R. 231). Admittedly Weidemann obtained no order equivalent to allowance of his appeal; if his appeal was not effectively taken without allowance, then the decree as to Weidemann is final *against* him. Pillsbury has no personal interest in the award, *and under the statute cannot enforce it unless and until it becomes final in Weidemann's favor.* Section 21(c) of the Longshoremen's and Harbor Workers' Compensation Act provides in part (44 Stat. 1436, U.S.C. 33:921):

> "If any employer or his officers or agents fails to comply with a compensation order making an award, *that has become final*, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District)."

It is unnecessary to argue whether in a proper case the deputy commissioner might have a right of appeal independently of the employee, because if ever he had such right in this case, his appeal is moot if Weidemann's appeal fails. The decree being final, against Weidemann, there is nothing which Pillsbury, as deputy commissioner, could enforce, even if he were successful on his own appeal.

(c) If Weidemann's appeal fails, Pillsbury's appeal must fail for want of a summons and severance. In the memorandum of the Solicitor General on the application for certiorari, it was suggested "that summons and sev-

erance are unnecessary because of the independent basis for action allowed the deputy commissioner by the statute'' (citing sections 21(c) and 22 of the Longshoremen's and Harbor Workers' Compensation Act, U.S.C. 33:921, 922). The reasons given in the preceding paragraph show, however, that the deputy commissioner's right of appeal, if it ever existed under the circumstances of this case, has become moot. Furthermore, the need for summons and severance depends entirely upon the face of the decree; summons and severance is indispensable where the decree is joint on its face, regardless of the nature of the substantive rights involved (*Hartford Accident Co. v. Bunn* (1932) 285 U.S. 169, 178-179).

The question as to what constitutes a joint decree is often difficult, but the present case is clear and it affords as much reason as any case could afford for applying the summons and severance rule. Pillsbury has no personal interest in the award; his statutory right to enforce it is dependent, as above shown, upon its having become final in Weidemann's favor. The interests of the two respondents are connected so far as this decree is concerned, so that the decree is clearly joint within the summons and severance rule.

We believe for these reasons that the suggestion that there was an indirect or implied allowance of Pillsbury's appeal is neither well founded nor material.

CONCLUSION.

We respectfully submit that the decision of the Circuit Court of Appeals should be reversed, with instructions to dismiss both appeals.

Dated, San Francisco, California,
February 10, 1937.

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FRANCIS GILL,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 558

ALASKA PACKERS ASSOCIATION (A CORPORATION), PETITIONER

v.

WARREN H. PILLSBURY, AS DEPUTY COMMISSIONER OF THE THIRTEENTH COMPENSATION DISTRICT UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AND FRANK WEIDEMANN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT WARREN H. PILLSBURY, DEPUTY COMMISSIONER

Respondent Pillsbury does not oppose the granting of the writ of certiorari in this case.

The decision of the court below with respect to the motion to dismiss (R. 260–269) interprets Section 8 (c) of the Judiciary Act of 1925 (c. 229, 43 Stat. 939, 940; U. S. C., Title 28, Sec. 230), in a way which conflicts with decisions in other circuits cited at pp. 12–13 of the petition.

It is true that with respect to respondent Pillsbury two orders were signed by the District Judge (R. 243, 250–251) which we believe are sufficient to constitute the allowance of an appeal under cases cited at page 22 of the petition. Those cases were, however, decided under a different statute, and the orders there involved were not precisely the same as the ones here in question. Moreover, even if the orders constitute the allowance of respondent Pillsbury's appeal, the further question of summons and severance arises, for no similar orders were entered with respect to respondent Weidemann's appeal. Although we believe that summons and severance are unnecessary because of the independent basis for action allowed the deputy commissioner by the statute (Secs. 21 (c), 22, U. S. C., Title 33, Secs. 921 (c), 922, *infra*, pp. 4–7), nevertheless we have been unable to find any case in which the question has been decided.

Respondent Pillsbury also does not oppose the granting of certiorari to review the decision of the court below reversing the order of the District Court. The question upon which the court below divided—that of the finality of a decision on jurisdiction with respect to a later award in the same case—and the procedural question upon which all members of the court below agreed—that of the efficacy of a petition for rehearing of the commissioner's award to extend the time for filing a bill in the District Court questioning that award—are impor-

tant questions under a national statute which have not been, but should be, decided by this Court.

Respectfully submitted.

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JANUARY 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1938

APPENDIX

STATUTES INVOLVED

Section 19 (e) of the Act (U. S. C., Title 33, Section 919 (e)) reads:

> The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail to the claimant and to the employer at the last known address of each.

Section 21 (a), (b), (c), and (d), of the Act (*Id.*, Section 921 (a), (b), (c), and (d)) reads as follows:

> *Review of compensation orders.*—(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.
>
> (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the Dis-

trict of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award that has become final, any beneficiary of such award or the deputy commissioner making the order may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this chapter.

Section 22, as it read at the times herein concerned is (c. 509, 44 Stat. 1437):

SEC. 22. Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time during the term of an award and after the compensation order in respect of such award has become final, review such order in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase, or decrease such compensation. Such new order shall not affect any compensation paid under authority of the prior order.

As enlarged by the later Act of May 26, 1934, Section 22 now reads (U. S. C., Title 33, Section 922):

Modification of awards.—Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this chapter, and in

accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the commission.

The Act of May 4, 1928 (U. S. C., Title 33, Section 921a), reads:

Appearance of United States district attorney for Commission or deputy commissioner.—In any court proceedings under section 921 of this title or other provisions of this chapter, it shall be the duty of the district attorney of the United States in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the United States Employees' Compensation Commission or its deputy commissioner when either is a party to the case or interested, and to represent such commission or deputy in any court in which such case may be carried on appeal.

U. S. GOVERNMENT PRINTING OFFICE: 1937

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1936

No. 558

ALASKA PACKERS ASSOCIATION (a corporation),

Petitioner,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and FRANK WEIDEMANN,

Respondents.

BRIEF FOR RESPONDENT, FRANK WEIDEMANN, OPPOSING THE ISSUANCE OF A WRIT OF CERTIORARI.

VICTOR H. PINCKNEY,
310 Sansome Street, San Francisco, California,
Proctor for Respondent, Frank Weidemann.

RESLEURE, VIVELL & PINCKNEY,
310 Sansome Street, San Francisco, California,
Of Counsel.

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BRIEF FOR RESPONDENT, FRANK WEIDEMANN, OPPOSING THE ISSUANCE OF A WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Respondent Frank Weidemann respectfully opposes the granting of a writ of certiorari herein, and re-

spectfully submits it should be denied upon the following grounds:

THE CIRCUIT COURT OF APPEALS' DECISION IN THIS CASE IS NOT OF FAR-REACHING EFFECT OR OF GREAT PUBLIC IMPORTANCE.

The order of the Circuit Court of Appeals for the Ninth Circuit denying motion of petitioner to dismiss the appeal of the Deputy Commissioner under the United States Longshoremen's and Harbor Workers' Compensation Act and of Captain Frank Weidemann applies to the facts of this particular case only. It concerns only the instant litigants and even as to petitioner it is of slight importance. To Captain Frank Weidemann alone this decision, involving something less than $3000.00, the amount of his compensation award, of the benefits of which he has been deprived by petitioner for over seven years, is of vital importance. Had the Circuit Court of Appeals for the Ninth Circuit dismissed the appeals in the only words appropriate under the circumstances, namely: *"Dismissed for reliance upon the rules of this court"*, he might well have felt aggrieved and have lost confidence in the justice of courts of law, and he and his family would certainly have suffered a financial loss, serious only by reason of their comparatively limited means.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

This decision denying petitioner's motion to dismiss is based upon the special rule of the Circuit Court of

Appeals for the Ninth Circuit with regard to appeals in admiralty. Until some other Circuit Court shall decide that the Circuit Courts have no power by rule to permit the taking of an appeal by notice without application and allowance of the appeal, there can be no conflict. Certainly the various non-admiralty cases cited by petitioner and one admiralty case where there were express rules of court specifically requiring allowance of the appeal cannot create a conflict with this decision where the rule expressly states no petition or allowance shall be necessary.

ADMIRALTY RULE 1 OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT PERMITTING APPEALS IN THE MANNER TAKEN HERE IS CONTROLLING IN THIS MATTER AND WAS NOT INTENDED TO BE SUPERSEDED BY THE ACT OF FEBRUARY 25, 1925.

The appeals in this case were taken in accordance with Admiralty Rule 1 of the Rules of the Circuit Court of Appeals for the Ninth Circuit, and in conformity with the uniform practice in admiralty appeals in the Ninth Circuit for over thirty years. In unmistakable language it is provided that appeals in admiralty cases shall be taken by the filing and service of a simple notice of appeal. The Rule and its footnote are as follows:

> "An appeal from an interlocutory or final decree to the Circuit Court of Appeals shall be taken by filing in the office of the Clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of.

> The appeal shall be heard on the pleadings and evidence in the District Court, unless the Appellate Court, on motion, otherwise order."

The footnote reads:

> "This rule so far modifies Rule 11 of the General Rules that a petition for an appeal and the allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal. The assignment of errors must, however, be sent up to the appellate court with the apostles, as required in Rule 4 of the Admiralty Rules (Kenney v. Louie, No. 939. Motion to dismiss appeal denied May 6, 1903.)"

Petitioner would concede that this Rule was valid and the procedure it provided adequate under the *Act of March 3, 1891* (Ch. 517, sec. 11, 26 Stat. p. 829), but would contend that the Rule was superseded by the *Act of February 13, 1925* (Ch. 229, sec. 8 (c), 43 Stat. p. 940; 28 U. S. C. sec. 230).

Apparently the argument is that the 1891 statute provides that no appeal or writ of error "shall be *taken or sued out* except within six months after the entry of the order, judgment or decree * * *"; whereas, the 1925 statute provides that no writ of error or appeal *"shall be allowed unless application therefor* be duly made within three months after the entry" of the judgment or decree. (Italics ours.)

We think it clear that in passing the 1925 statute Congress had in mind no such technical distinction between "take" on the one hand, and "apply" on the other. Congress was not seeking to alter the *procedure*

but the *time* for appeal—shortening it from six to three months. It was not intended by Congress to deprive the courts of the power to provide in their rules for admiralty appeals as of right by notice.

That Congress did not itself intend by the statute of 1925 to deprive the courts of their power to provide that admiralty appeals might be *taken* (as distinguished from petitioning for an allowance) is shown by the *Act of April 3, 1926* (Ch. 102, 44 Stat. pt. 2, p. 233; 28 U. S. C. sec. 227). This is the statute which provides that appeals may be *taken* from interlocutory as well as from final decrees in admiralty and by its very language shows that Congress understood in 1926 that admiralty appeals might still be *taken* as they had been before 1925. The 1926 statute (italics ours) reads:

> "* * * In all cases where an appeal from a final decree in admiralty to the circuit court of appeals is allowed an appeal may *also be taken* to said court from an interlocutory decree determining the rights and liabilities of the parties; PROVIDED, That the same is *taken* within fifteen days after the entry of the decree; AND PROVIDED FURTHER, That within twenty days after such entry the appellant shall *give notice* of the appeal to the appellee or appellees; but the *taking* of such appeal shall not stay proceedings under the interlocutory decree unless otherwise ordered by the district court upon such terms as shall seem just."

This Act of 1926 recognizes the right to *take* an appeal in an admiralty case by the use of the phrase "an appeal may *also* be taken". The word "also" obviously connotes that an appeal may be taken from

a final decree in admiralty. Congress assumed the right to *take* such an appeal and intended to *extend* that right also to an interlocutory decree in admiralty. For otherwise we have the anomalous situation that a party can appeal from a purely *interlocutory* decree in admiralty of his own volition, but can only appeal from a *final* decree by filing an application to be allowed to do so. This reduces the situation to an absurdity.

By the *Act of January 31, 1928* (Ch. 14, secs. 1, 2, 45 Stat. 54; 28 U. S. C. sec. 861 (a)), Congress abolished writs of error in civil and criminal cases and provided that the relief theretofore obtained by the writ should thereafter be obtainable by appeal.

Recognizing, however, that there were appeals as of right, as distinguished from those new appeals superseding the writs of error in civil and criminal cases and having in mind, no doubt, that, as recognized in its Act of 1926, appeals were *taken,* as they always had been in admiralty, the Congress went on to provide in the 1928 Act that in all cases where an appeal might be taken as of right it should be by service and filing of notice and that "no petition of appeal or allowance of an appeal shall be required".

The text of this provision is as follows:

> "That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part

thereof. No petition of appeal or allowance of an appeal shall be required; *Provided, however,* that the review of judgments of state courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

Act Jan. 31, 1928, Ch. 14, sec. 2; 45 Stat. 54; 28 U. S. C. sec. 861(a).

The effect of this last provision was that, whereas previously it was left to the Circuit Courts of Appeals to provide by their rules, as the Circuit Court of Appeals had done, that where appeals were a matter of right, as in admiralty, they should be taken by notice without petition, this method was now Congressionally prescribed.

By the *Act of April 26, 1928* (Ch. 440, 45 Stat. p. 466; 28 U. S. C. sec. 861(b)), Section 2 of the Act of January 31, 1928, was amended to provide that the old statutory writ of error procedure should apply to the appeals which the Act of January 31, 1928, substituted for pre-existing writs of error. Section 2 of the Act of January 31, 1928, as thus amended, reads as follows:

"The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

28 U. S. C. sec. 861(b).

This writ of error procedure applies, by the text of the new Section 2, only to appeals which are substituted for the abolished writs of error; that is to say, actions at law.

Territory of Hawaii v. Gay (9 CCA), 52 F. (2d) 356.

The provision of the original Section 2 of the Act of January 31, 1928, for appeal by serving and filing notice in cases where the appeal is of right, was not repeated in the amended section. There was thus no specific statutory procedure for appeals in admiralty and the courts were left free, as they had been before the Act of 1928, to provide for such appeals by notice.

In accordance with its statutory authority to prescribe matters of procedure within its jurisdiction, the Circuit Court of Appeals for the Ninth Circuit on May 21, 1900, adopted Admiralty Rule 1.

The validity of this Rule up to the Act of Congress of February 13, 1925, is not questioned by petitioner. It would claim, however, that the present Admiralty Rule 1 was superseded by the 1925 statute. As a matter of fact, Admiralty Rule 1, as it now stands, was not adopted by this Court until June 27, 1928, effective July 1, 1928. On the former date, this court exercising its rule-making power under the Judicial Code *(Act of March 3, 1911,* sec. 122, 36 Stat. 1132, 28 U. S. C. sec. 219), adopted, "In the Matter of the Amendment and Adoption of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit", the following order:

"IT IS ORDERED that the Rules of Practice of this Court, heretofore adopted, be, and the same are abolished as of June 30, 1928.

IT IS FURTHER ORDERED that the rules, as amended and adopted, this 27th day of June, A. D. 1928, be, and they hereby are declared to be the Rules of Practice of the United States Circuit Court of Appeals for the Ninth Circuit, effective July 1, 1928."

So far as concerns Admiralty Rule 1, the only change from the old form of 1900 is to make provision for appeals from interlocutory as well as from final decrees in admiralty. The old method of appeal by serving and filing notice without petition and allowance continued precisely the same.

At the time of the adoption of its new rule, the Circuit Court for the Ninth Circuit had before it the Act of 1925 on which appellee relies, the Act of 1926 providing that admiralty appeals from interlocutory decrees may "also be taken", and the two Acts of 1928 which we have reviewed above. It must have been evident to the Circuit Court that these various enactments did not alter the situation as it existed before the Act of 1925, namely, that in admiralty cases the appeals were as of right and that the Circuit Court of Appeals might, by rule, provide that they should be taken on notice without petition and allowance. Petitioner would concede that, prior to the enactment of 1925, appeals in admiralty by notice without petition were in order. This was, however, not by virtue of the statute of 1891 itself but by virtue of court rules, even before the statute of 1925 and the subse-

quent enactments to which we have referred, petitions for appeals, as contrasted with notice of appeal, used to be required under the general court rules, but it was recognized that this general practice could be changed by special admiralty rule and it was by virtue of such an admiralty rule, not by statute, that the practice was so changed in the Ninth Circuit. (1 *C. J.* 1348.) It was only for a brief period (between the Act of January 31, 1928, and its amendment by the Act of April 26, 1928) that statute did explicitly prescribe for appeal by serving and filing of notice without petition for appeal or allowance in cases where appeal might be taken as of right.

In other circuits, specifically in the Third (Benedict, 5th ed., secs. 536, 543), where there were no special admiralty rules and the general rules applied, the petition was still required even in admiralty cases. Hence, the decision in *The Ruth,* 20 F. (2d) 314, from the Third Circuit, cited by petitioner, has no bearing on the situation. For, despite the old Act of 1891, permitting the "taking" of appeals, as distinguished from "applying" therefor, petitions for allowance were required under the general rules where there was no admiralty rule to the contrary.

We have been unable to find *any* case holding that the Act of 1925 in any way *changed* the former admiralty practice or that it invalidated former, or inhibited subsequent, admiralty rules and that an appeal might be taken by filing notice thereof. We submit that no such change was in fact made or intended to be made.

The cases cited by petitioner, as sustaining its contention as being in conflict with the instant decision,

Baez v. People of Porto Rico (1st CCA), 82 F. (2d) 317;

Osborn v. United States (4th CCA), 50 F. (2d) 712;

Ross v. White (6th CCA), 32 F. (2d) 750;

United States v. New National Coal & Mining Co. (7th CCA), 72 F. (2d) 168;

Robie v. Hart, Schaffner & Marx (8th CCA), 40 F. (2d) 871;

Share v. United States (8th CCA), 50 F. (2d) 669,

are clearly distinguishable as being, like the *Ruth* case, cases falling under the general rules (where a petition for an appeal is necessary) and not under the admiralty rules (where it is not).

To summarize the situation. No one disputes that under the Act of 1891 the Circuit Courts of Appeals could, by rule, provide for admiralty appeals by notice without petitioning therefor. The contention of petitioner that Congress intended to change this by the Act of 1925 is refuted by the Act of Congress of 1926 which provided that appeals from interlocutory decrees in admiralty might also (that is to say, in addition to appeals from final admiralty decrees) be taken and that the method was by notice. In the Act of January 31, 1928, Congress abolished writs of error and explicitly prescribed (apart from court rule) that where appeals might be taken as of right (as in admiralty) the method was notice without petition or allowance, and the Act of April 26, 1928, dropped this

leaving the courts free, as before, to provide for such appeals by rule and prescribing the writ of error method only for those appeals which took the place of former writs of error.

There was thus one brief period in 1928 when the statutes themselves required appeals, where they lay as of right, as in admiralty cases, to be by notice, and there has been no time since 1891 when the Circuit Courts of Appeals were not free so to provide by rule. The Circuit Court of Appeals for this circuit has always so provided—originally by its Admiralty Rule 1 of May 21, 1900, and afterward by its amended Rule 1 (taking in appeals from interlocutory decrees in admiralty) of June 27, 1928, effective July 1, 1928.

It should be mentioned, finally, that both *Admiralty Rule 49, I. K., of the United States Supreme Court* and *Admiralty Rule 4, 1 (k), of the Circuit Court of Appeals for the Ninth Circuit,* provide that "notice of *or* prayer for an appeal" shall be included in the apostles on appeal, thereby recognizing that the Circuit Courts may provide for admiralty appeals on notice rather than petition.

EVEN IF ALLOWANCE OF AN ADMIRALTY APPEAL IS NECESSARY, THIS WILL BE IMPLIED FROM OTHER ORDERS OF THE DISTRICT COURT, RECOGNIZING THAT AN APPEAL HAS BEEN TAKEN.

Two days before Weidemann's notice of appeal was served and filed, the trial judge ordered the original exhibits in the case transmitted to the Circuit Court of Appeals at the instance of respondent Pillsbury.

From this fact, Weidemann was entitled to presume that the appeal had been allowed, or at least had the District Court's approval.

We do not claim that it was because of this order that appellant Weidemann gave notice of appeal but failed to petition for and secure an order allowing his appeal, as we neither then, nor now, considered such petition or order necessary in an admiralty appeal in the Ninth Circuit. However, had we deemed such procedure necessary or proper, or had it been required, the requirement was dispensed with by the District Court's prior recognition of the merits of the appeal in his order transmitting the exhibits in Pillsbury's appeal, which involved the same question as in Weidemann's appeal.

The only reason for an order allowing an appeal in cases other than admiralty being to afford the court the opportunity to reject or refuse to allow frivolous appeals, it follows that any order which indicates that the court does not consider the appeal unmeritorious dispenses with the necessity for a petition for or order of allowance.

Many orders of the judges, other than a formal order allowing an appeal, are deemed sufficient to indicate the allowance of an appeal. See the following cases, after each of which we point out the nature of the order deemed sufficient to indicate the allowance of an appeal:

Brandies v. Cochrane, 105 U. S. 262; 26 L. ed. 989 (approving bond and signing the citation);

Sage v. Railroad Co., 96 U. S. 712, 24 L. ed. 641 (approving bond or accepting security);

Brown v. McConnell, 124 U. S. 489, 490, 31 L. ed. 495 (the court signing the citation);

In re Fiechtl et al., 107 Fed. 618 (CCA 7th) (approval of appeal bond and order extending time to file record on appeal);

Weinstein v. Black Diamond S. S. Corp., 31 Fed. (2d) 519 (CCA 2nd) (approval of a supersedeas bond);

Louisville Trust Co. v. Stockton, 72 Fed. 1 (CCA 5th) (signing the bill of exceptions and the citation).

See the decision of this court in

Alaska United Gold Min. Co. v. Keating, 116 Fed. 561.

And also

Henderson County N. C. v. Wilkins, 43 Fed. (2d) 670-672 (CCA 4th).

The only case cited by petitioner, to indicate less liberality on the part of the Appellate Courts in construing actions of the trial courts as equivalent to an order allowing an appeal than here contended, is *Ross v. White*, 32 Fed. (2d) 750 (CCA 6th). The only act on the part of the trial court in that case, however, was to attest to the fact that the clerk (who authenticated the transcript of the record) was, at the date of the certificate, clerk of the court, and that his attestation was in due form. This is quite different, in that it does not necessarily imply knowledge on the part of the judge that the particular case is being

appealed, than an act of the court, such as here, in ordering the original exhibits in the case transmitted to the Appellate Court or in making any of the orders or performing any of the acts indicated in the cases above cited. We submit, for example, that had the judge in *Ross v. White,* himself, authenticated the transcript the decision might have been otherwise.

It is respectfully submitted that there is no occasion for the issuance of the writ prayed for, and that it should be denied.

Dated, San Francisco, California,
January 4, 1937.

VICTOR H. PINCKNEY,
Proctor for Respondent,
Frank Weidemann.

RESLEURE, VIVELL & PINCKNEY,
Of Counsel.

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OCTOBER TERM, 1936

No. 558

ALASKA PACKERS ASSOCIATION, PETITIONER

v.

WARREN H. PILLSBURY, AS DEPUTY COMMISSIONER OF THE THIRTEENTH COMPENSATION DISTRICT UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AND FRANK WEIDEMANN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT WARREN H. PILLSBURY, DEPUTY COMMISSIONER

OPINIONS BELOW

The District Court rendered no opinion. Its findings of fact and conclusions of law (R. 204–208) are unreported. The opinion of the Circuit Court of Appeals denying a motion to dismiss the appeal to that court (R. 260–269) is reported in 78 F. (2d) 587. The opinion and dissenting opinion of that court on the merits (R. 271–285) are reported in 85 F. (2d) 758.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered September 22, 1936 (R. 286). The petition for certiorari was filed December 7, 1936, and was granted January 18, 1937 (R. 289). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In view of the limitation contained in the order allowing certiorari (R. 289), the question presented is the operation of the Act of February 13, 1925, and its effect upon Rule 1 of the Admiralty Rules of the Circuit Court of Appeals for the Ninth Circuit with respect to the mode of taking an appeal.

STATUTE AND RULE OF COURT INVOLVED

Section 8 (c) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940 (U. S. C., Title 28, Section 230), provides:

> No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

Rule 1 of the Admiralty Rules of the Circuit Court of Appeals for the Ninth Circuit provides: [1]

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[1] Printed in its original form at 208 Fed. xx; in amended form, in Digest of United States Supreme Court Reports, vol. 1–A, Supplement No. 3, p. 116.

> An appeal from an interlocutory or final decree to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of.
>
> The appeal shall be heard on the pleadings and evidence in the District Court, unless the Appellate Court, on motion, otherwise order.

A footnote to Rule 1 reads: [2]

> This rule so far modifies Rule 11 of the General Rules that a petition for an appeal and the allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal. The assignment of errors must, however, be sent up to the appellate court with the apostles, as required in Rule 4 of the Admiralty Rules. (*Kenney* v. *Louie*, No. 939. Motion to dismiss appeal denied May 6, 1903.)

STATEMENT

Respondent Weidemann sustained personal injuries at Alameda, California, aboard a ship of the Alaska Packers Association, petitioner herein, and was awarded compensation against petitioner

[2] The court below stated (R. 264) that this footnote is "an integral part of the rule" and recited (R. 263–264) the circumstances bringing about its inclusion in the rules.

under the Longshoremen's and Harbor Workers' Compensation Act (c. 509, 44 Stat. 1424; U. S. C., Title 33, Ch. 18) by the United States Employee's Compensation Commission. Respondent Pillsbury, Deputy Commissioner, rendered the compensation order (R. 155).

Petitioner thereupon filed its bill (R. 2) in the United States District Court to set aside the Deputy Commissioner's compensation order. The proceedings were transferred to the Admiralty side of the court (R. 14, 15, 23) and additional testimony taken. The District Court filed findings of fact and conclusions of law (R. 204), and on December 27, 1934, entered a final decree setting aside the compensation order (R. 231).

On March 25, 1935, the Deputy Commissioner filed with the clerk of the District Court notice of his appeal (R. 233–235) and his assignments of error (R. 236). Notice thereof was served on counsel for petitioner. On March 25, 1935, the trial judge, after the filing and service of the Deputy Commissioner's notice of appeal, signed an order which recited the filing and service of that notice of appeal and which directed all the original exhibits in the case to be transmitted to the Circuit Court of Appeals with the apostles on appeal (R. 243). On the same day the trial judge signed a second order approving the stipulation of counsel respecting the content of the apostles and the right to file supplemental apostles (R. 250–251). These orders were filed March 25, 1935, and were incor-

porated in the transcript of record before the Circuit Court of Appeals (R. 243, 251).

On March 27, 1935, Weidemann filed with the clerk of the District Court and served notice of his appeal (R. 235), and on April 22, 1935, filed his assignments of error (R. 237). On April 6, 1935, the trial court approved Weidemann's cost bond (R. 248). The two appeals were consolidated by order of the District Court filed May 9, 1935 (R. 244).

Petitioner, in the Circuit Court of Appeals for the Ninth Circuit, moved to dismiss the appeals on these grounds: first, that no application was made to and allowed by any judge or court; second, that as to Weidemann's appeal, no assignments of error were filed as provided by General Rule 11 of that court, and that the appeal was not timely; and third, that as to the Deputy Commissioner's appeal, if Weidemann's appeal were dismissed, it would follow that this appeal must be, because the decree is joint and not severable or subject to summons and severance, and further, that the Deputy Commissioner has no interest in the subject matter and cannot maintain an appeal on his own behalf (R. 257).

This motion was overruled. The Circuit Court of Appeals rendered an opinion upon the motion in which it stated that the appeals here were taken in strict compliance with Admiralty Rule 1 of the Ninth Circuit, *supra*, p. 3, and that that rule, as

here applied, is in harmony with Section 8 (c) of the Act of February 13, 1925, *supra*, p. 2.

The case is brought before this Court upon a writ of certiorari limited to the question of the operation of the Act of February 13, 1925, and its effect upon Admiralty Rule 1 of the Circuit Court of Appeals of the Ninth Circuit. The decision and opinions (R. 271–285) of the Circuit Court of Appeals upon the merits, reversing the District Court, are not here involved.

SUMMARY OF ARGUMENT

Admiralty Rule 1 of the Ninth Circuit Court of Appeals was adopted on May 21, 1900, and provides that appeals in admiralty to that court may be taken by filing a notice of appeal in the office of the clerk and serving it upon the adverse party. The rule was readopted in 1928. It is now contended that it is in conflict with the express language of Section 8 (c) of the Act of February 13, 1925.

That section, as is evident from the legislative history, was designed solely to change the *time* within which an appeal might be allowed and was not intended to affect the *mode* of taking an appeal. No reference is made in either the reports of the legislative committees or in the debates in Congress of any intention to change the manner of taking appeals, even though at that time the Second and the Ninth Circuits each had rules which would, if petitioner were correct, have been changed by the statute. Moreover, other sections of the Act of

February 13, 1925 indicate that petitioner's contention is unsound.

Petitioner is likewise incorrect in urging that Admiralty Rule 1 conflicts with prior statutes. The Admiralty Rules of the Second Circuit for over twenty-five years allowed appeals merely by notice and the Admiralty Rule here involved has been in effect since 1900. It is inconceivable that rules so long established should be wholly without foundation. *Stuart* v. *Laird*, 1 Cranch 299, 308.

Cases cited by petitioner in support of its position do not hold invalid rules such as the one here involved, but merely contain general statements that under Section 8 (c) every appeal must be allowed. To the extent that those cases are in conflict with the above analysis, we submit that they are erroneous.

ARGUMENT

The development of the statutes and rules of court regulating the appellate jurisdiction and practice of the court below is set forth in its opinion denying petitioner's motion to dismiss the appeals, (R. 261–265.) The Act of March 3, 1891 (c. 517, 26 Stat. 826; U. S. C., Title 28, Ch. 6), which established the United States Circuit Courts of Appeals, did not prescribe the form or manner in which appeals to those courts should be taken,[2] but, by Section 2, expressly gave to the Circuit Courts of Appeals the power, which remains with

[2] See p. 14, *infra*.

them, to prescribe the form of writs, process and procedure conformable to the exercise of their jurisdiction and to make court rules for the conduct of their business. Accordingly, the Circuit Court of Appeals for the Ninth Circuit on June 22, 1891, established its General Rules for the conduct of business, of which Rule 11 prescribes the manner of taking appeals. Rule 11, as amended in 1924 to include a provision relative to citation, and in 1928 to delete references to writs of error, reads as follows (R. 262):

> The appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No appeal shall be allowed until such assignment of errors shall have been filed. Citation shall issue immediately upon the allowance of the appeal. * * *

Until the adoption by that court of its Admiralty Rules, admiralty appeals were governed by this general provision, and an allowance of the appeal was necessary. On May 21, 1900, the Circuit Court of Appeals for the Ninth Circuit adopted its Admiralty Rules, of which Rule 1 originally read (R. 262):

> An appeal to the Circuit Court of Appeals shall be taken by filing in the office of the Clerk of the District Court, and serving on the proctor of the adverse party, a notice signed by the appellant or his proctor that

> the party appeals to the Circuit Court of Appeals from the decree complained of * * *.

On June 27, 1928, this rule was amended and readopted in its present form, *supra*, p. 3.

Soon after the adoption of Admiralty Rule 1 in its original form, the court below considered the unreported case of *Kenney* v. *Louie*, (R. 263) the decision of which prompted the court to append to its Admiralty Rule 1 a footnote, which was preserved in the 1928 revision (*supra*, p. 3), which states that General Rule 11, *supra*, is modified so that in an admiralty case a petition for appeal and an allowance thereof is not required, nor is an assignment of errors required to be filed with the notice of appeal. This footnote was stated by the court below to be recognized as an integral part of Admiralty Rule 1. A footnote was appended to General Rule 11 admonishing the reader to "see note to Admiralty Rule 1." (R. 263–264.)

The court below declared it was not unaware of the passage of the Act of February 13, 1925, when it revised its rules and readopted Admiralty Rule 1 in 1928, but that, instead, "The revision was made in the light of and in conformity with the Act" (R. 267), stating (R. 265):

> The purpose and, we think, the only purpose of Sec. 8 (c) of the Act of February 13, 1925, was to shorten from six months to three months the time within which appeals might be taken to the Circuit Courts of Appeals.

We submit that the court below was correct in so holding, and that Section 8 (c) should be held to have no bearing whatsoever upon the *mode* of taking an appeal.

Petitioner contends, however, that by Section 8 (c) Congress made mandatory and jurisdictional the allowance of an appeal in every case, and that Admiralty Rule 1, is, therefore, in conflict with the statute and void. We are unable to agree.

In the first place, it is quite apparent from the legislative history of the measure that it was designed solely to change the *time* within which an appeal should be allowed, and was not intended to affect the *mode* of taking an appeal. The original bills which eventually became the Act of February 13, 1925 (S. 2060 and H. R. 8206) did not contain the provision now included as Section 8 (c). Congressional Record, 68th Cong., 2d Sess., pp. 2750, 2877. Section 8 (c) was an amendment proposed and apparently drafted by some of the members of this Court. It was enacted without change and adopted by the House without debate. *Id.*, pp. 2918, 2879, 3005; House Report No. 1075, 68th Cong., 2d Sess.

At the hearing before the Committee on the Judiciary, Mr. Justice Van Devanter stated:

> In section 8 (c) the bill fixes three months as the period within which application must be made for a writ of error or appeal to take any case before a circuit court of appeals for review. The period now prescribed is

six months, and the purpose of the change is to make this period conform to that fixed for applying for a review in the Supreme Court. There is no reason why a longer period should be allowed when a review is in the circuit court of appeals than when it is sought in the Supreme Court.[4]

The debates in the Senate are similarly devoid of any indication that the purpose of the bill was to be any other than a change in the time within which appeals could be taken. Some pertinent extracts from the remarks of Senator Albert B. Cummins, Chairman of the Senate Committee on the Judiciary, are set out in the margin.[5]

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[4] Hearings of the Committee on the Judiciary, 68th Cong., 2d Sess., serial 45, p. 16.

[5] Congressional Record, 68th Cong., 2d Sess., p. 2918:

Mr. CUMMINS. They are amendments which have grown out of correspondence sent to me, and sent to the Chief Justice, and sent to the chairman of the Judiciary Committee of the House with respect to certain formal matters, matters which are really formal.

* * * * *

Mr. CUMMINS. That would reduce by three months the time provided in the present statute. The time now is six months. It is simply absurd, it seems to me, to say that a successful litigant must wait six months in order to allow his opponent time to make up his mind whether he will prosecute an appeal or sue out a writ of error.

Mr. KING. Mr. President, I want to ask the Senator whether the right of review must be perfected, the record made up, and everything prepared within three months?

Mr. CUMMINS. No.

Mr. KING. The Senator knows that in many instances, in order to make up a record, get a transcript of testimony, settle the bill of exceptions, and what not, more than three

The absence of all indication of an intention to change the mode of taking an appeal becomes even more significant in light of the fact that at that time the two leading admiralty circuits, the Second and Ninth, each had rules specifically providing that appeals in admiralty might be taken without an allowance (Admiralty Rules, Rule 1 (see 150 Fed. lv, cxxxv)) [6] which were, moreover, impliedly recognized by the rules of this Court (Admiralty

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months are consumed. I have known many instances where a much longer time than three months was required, even where the person who sought the appeal or the writ of review acted with the utmost zeal. He could not obtain the record and settle the bill of exceptions within the time.

Mr. CUMMINS. This provides that the application for review shall be made within three months. That is simply the beginning of the process for reviewing the decree. I cannot imagine an instance in which the application cannot be made within three months if reasonable diligence is exercised, and it is very unfair to leave the matter in suspense.

Mr. OVERMAN. I understand that after a man makes his application, he will have all the time he wants to settle the record.

Mr. KING. We have not the amendments in printed form before us, and I am not familiar with the full text; but if after the application is filed the court has jurisdiction to extend the time within which the record may be perfected, that would be satisfactory.

Mr. CUMMINS. That is the law now, according to the Supreme Court of the United States. This is simply correcting the law with regard to the time for applying for a review from the circuit court of appeals.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment was agreed to.

[6] The rule in the Second Circuit was amended to require the allowance of an appeal on December 10, 1928.

Rules, Rule 49 (K) (see 254 U. S., App. pp. 22, 23)). Each of those rules had been in effect for over 25 years, and must have been known to the members of this Court and to the members of Congress who were engaged in drafting this legislation. If it was intended that those rules be abrogated, it is inconceivable that mention of that intention would not have been made.

Further proof that the phrase in Section 8 (c) referring to the allowance of an appeal should not be construed as making an allowance mandatory is afforded by other sections of the same Act. Twice in Section 1 and again in Section 10 the Act provides that appeals "may be taken". If the same canon of construction be applied to these phrases which petitioner seeks to apply to Section 8 (c), the Act would, in these instances, necessarily nullify any rules of court which required the allowance of an appeal. Obviously, they do not and were not intended to have that effect. No more so should language intended merely to accomplish a limitation on the time of appeals be held to effect a radical change in the mode by which those appeals are to be taken. The expressions "allowed", "taken", "entertained" and similar words are used in this and other statutes as words of description and not in a jurisdictional or procedural sense.

Petitioner urges, however (Br. p. 14) that even though it be conceded that Section 8 (c) had no effect upon the mode of taking an appeal, never-

theless Admiralty Rule 1 here involved is invalid because in conflict with prior statutes. We do not believe that such a conflict exists.

This Court has for many years required the allowance of an appeal to it, both from a state court or from an inferior Federal court, due to the express provision of Revised Statutes, Section 999, which was derived from the Judiciary Act of 1789. See *Havnor* v. *New York,* 170 U. S. 408, 410; *Barrel* v. *Transportation Co.,* 3 Wall. 424. No distinction was made in this regard with respect to appeals in admiralty. *Barrel* v. *Transportation Co., supra.*

The same rule has not, however, prevailed in the lower Federal courts. Upon the creation of the Circuit Courts of Appeals in 1891, those courts were, by Section 2, given power to prescribe the form of writs, process and procedure conformable to the exercise of their jurisdiction and to make court rules for the conduct of their business. (Section 2, Act of March 3, 1891, c. 517, 26 Stat. 826.) Cf. *The S. S. Osborne,* 105 U. S. 447, 450. Pursuant to this statute, and certainly with full knowledge of its provisions, the Second and Ninth Circuits adopted their Admiralty rules allowing appeals to be taken by filing notice thereof with the clerk. In the Second Circuit, a Justice of this Court, in addition to the judges of the Circuit Court of Appeals, apparently approved the procedure thereby specified. See 150 Fed. lv. Under these two rules literally thousands of appeals in admiralty must have

been prosecuted. Clearly such a long-continued and well accepted practice should not now be held improper. *Stuart* v. *Laird*, 1 Cranch 299, 308, 309. The general statements in the cases cited on p. 18 of petitioners brief are not persuasive to the contrary.

Petitioner contends (Br. pp. 11–13) that Section 2 of the Act of January 31, 1928[7] (c. 14, 45 Stat. 54) and the amending Act of April 26, 1928 (c. 440, 45 Stat. 466) lend support to his construction. Section 2 provided that in all cases where an appeal may be taken as of right it shall be taken by filing a written notice thereof with the clerk and serving a copy of the notice on the adverse party, with a proviso that the mode of taking an appeal from state courts of last resort should remain as it had been before—that is, by petition and allowance. This section was amended by the Act of April 26th to provide simply that appeals which were substitutes for the former writs of error should be governed by the provisions formerly applicable to writs of error.

Petitioner contends that the enactment of Section 2 and its subsequent amendment would be meaningless unless at the time Section 2 was enacted the statutes required the allowance of an ap-

[7] This Act was first proposed on February 29, 1924, as S. 2693, 68th Cong., 1st Sess.; see H. Rep. 934 (June 2, 1924).

peal in every case. We are unable to agree with the contention. If, as we have pointed out above, appeals in admiralty prior to 1928 might be taken by filing notice thereof, the Act of January 31st had no bearing upon the procedure in such cases. Consequently, the elimination of that section by the Act of April 26th was likewise without significance with respect to appeals of this character.

It is true that there are several cases in the Circuit Courts of Appeals which state broadly that Section 8 (c) requires that an appeal be allowed in every case. Brief for petitioner, pp. 7–9. None of them, however, holds that a rule of court such as that involved here is contrary to that section; indeed, in many instances the decisions seem to be predicated as much on the non-compliance with a court rule requiring the allowance of an appeal as upon a non-compliance with Section 8 (c). To the extent that the language of those opinions indicates that Section 8 (c) requires that an appeal most be allowed in *every* case, we believe they are in conflict with the true meaning and intent of Section 8 (c) as developed above.

The question as to whether the orders signed by the trial judge, referred to in the Statement, would amount to an action on the part of the court that may be construed as an allowance of the appeal, is not, in view of the limited order allowing certiorari, before this Court. It will only be discussed summarily in support of our request that in the event

that this Court decides the question presented contrary to our contention, this Court remand the case to the court below with the direction to determine whether, in fact, there was an allowance of the appeal. The court below did not consider this point, believing that no allowance of appeal was necessary.

The courts have said that no formal order of allowance of appeal or writ of error is necessary, but that there must be some action by the court that may be construed as an allowance thereof. *Sage* v. *Railroad Company*, 96 U. S. 712, 714; *Brown* v. *McConnell*, 124 U. S. 489, 490; *Vaughan* v. *American Insurance Co.*, 15 F. (2d) 526, 527 (C. C. A. 5th). Such actions as the taking of security and the signing of the citation (*Sage* v. *Railroad Company, supra; Brandies* v. *Cochrane*, 105 U. S. 262) and the signing of the citation alone (*Brown* v. *McConnell, supra*) have been held sufficient to effect the allowance of an appeal.

The orders here, which are set out in the margin,* cannot be said to be so disconnected from the act

* The orders are as follows:

ORDER TRANSMITTING ORIGINAL EXHIBITS

It appearing to the above-entitled court that Respondent Warren H. Pillsbury, having served and filed his notice of appeal in the above-entitled matter; and

Good cause now appearing therefor;

It is ordered that all original exhibits introduced in evidence in the above-entitled cause be and the same are hereby ordered transmitted to the United States Circuit Court of

of allowance of appeal as to render the opportunity of judicial decision unwarranted. Surely the action of the court in signing them is more indicative of an allowance of and an intent to allow an appeal than the situation presented in *Ross* v. *White*, 32 F. (2d) 750 (C. C. A. 6th), relied on by petitioner upon this point, and in which it was held that there had been no act sufficient to amount to an allowance of appeal.

We respectfully request, therefore, that in the event this Court should determine that the allowance of an appeal by the court is a necessary step in prosecuting an admiralty appeal in the Ninth Circuit, the case be remanded to the court below with directions to proceed to determine whether the appeal has, in fact, been allowed.

Appeals for the Ninth Circuit, as original exhibits, with the apostles on appeal in said cause.

Dated this 25th day of March, 1935.

HAROLD LOUDERBACK,
United States District Judge. (R. 243.)

STIPULATION RE PRAECIPE FOR APOSTLES ON APPEAL

It is hereby stipulated and agreed by and between the parties hereto that all pleadings, testimony, exhibits and other documents in the above case, other than those specifically specified in the foregoing praecipe, may be omitted from the apostles herein with the right reserved to any of the parties to file supplemental apostles herein if deemed necessary.

[Names of counsel.]

It is so ordered:

HAROLD LOUDERBACK,
United States District Judge. (R. 250.)

CONCLUSION

It is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed, and that, should this Court find the court below to be in error, the case should be remanded to the court below with directions to proceed to determine whether there was in fact an act sufficient to constitute the allowance of the appeal.

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MARCH 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 558.—October Term, 1936.

Alaska Packers Association, Petitioner, *vs.* Warren H. Pillsbury, as Deputy Commissioner, et al.	Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 26, 1937.]

Mr. Justice Van Devanter delivered the opinion of the Court.

The question here presented is whether an appeal to a circuit court of appeals from a decree in admiralty in a district court may be taken by simply filing in the office of the clerk of the district court, and serving on the proctor of the adverse party, a notice of appeal. In this case the circuit court of appeals, in deference to a rule adopted by it in 1900 and readopted in 1928, sustained an appeal so taken and overruled the appellee's contention that the rule is in conflict with § 8 (c) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; 28 U. S. C. § 230; which provides:

"No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

We are of opinion that the statute is both applicable and controlling.

Prior to the creation of the circuit courts of appeals the recognized mode of taking an appeal from a decree in admiralty, as well as from a decree in equity, was by making application to the court rendering the decree, or to a judge or justice, and obtaining an allowance of an appeal. The authorized procedure in this regard is shown in *Barrel* v. *Transportation Company*, 3 Wall. 424, where an appeal in admiralty was sought to be taken by simply filing a petition in the office of the clerk of the court. This Court dismissed the appeal, saying:

"The proceeding in the case is not warranted by any act of Congress, and we have no authority to act on such a petition. The filing of it in the clerk's office, even if it could be regarded as addressed

to the Circuit Court, would be of no avail, unless accompanied by an allowance of an appeal by that court; and in the case before us there was no allowance."

The act creating the circuit courts of appeals[1] and investing them with stated appellate jurisdiction, including appeals in admiralty, made no change in the prior procedure. On the contrary, § 11 of that act provided:

"And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."[2]

The reasons for requiring that an appeal be duly applied for and allowed is that there may be some assurance that the suit is one in which there may be a review in the circuit court of appeals; that the decree is of such finality or character that it may be reexamined on appeal; and that appropriate security for costs may be taken where the appellant is not by law exempted from giving such security.[3] In this way improvident and unauthorized appeals are prevented. While an appeal in a proper case is matter of right the question whether the case is a proper one under the law regulating appeals is not left to the appellant, but is to be examined and primarily determined by the court or judge to which the application is to be made. The reasons for thus conditioning the right of appeal have the same application to decrees in admiralty that they have to decrees in equity and judgments at law; and the act of 1925 includes one as much as another, for it says: "No . . . appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made". In all of the circuits other than the one in which the decision now under review was made full effect

[1] Act of March 3, 1891, c. 517, 26 Stat. 826.

[2] See Title 28, U. S. C., § 228.

[3] See Bartemeyer v. Iowa, 14 Wall. 26, 27; Havemeyer v. New York, 170 U. S. 408, 410; Ireland v. Woods, 246 U. S. 323, 328.

is given to this requirement. In the one circuit a rule exists whereby appeals in admiralty are excepted. But that rule contravenes the statute and has no force, for the power of a court to make rules necessarily is confined to such as are consistent with controlling laws.

It follows that the circuit court of appeals was without jurisdiction to entertain the attempted appeal.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.